NO. 90-1985

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ALBANY INSURANCE COMPANY,
Petitioner

Versus

ANH THI KIEU,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Is the doctrine of *uberrimae fidei* ("of utmost good faith" - duty to disclose material facts) entrenched federal precedent in marine insurance law?

Under the analysis mandated by this Court in *Wilburn Boat Co. vs. Fireman's Fund Insurance Co.*, entrenched federal admiralty precedent supersedes state insurance law in marine insurance matters. The United States Court of Appeals for the Fifth Circuit has held that *uberrimae fidei* is not entrenched federal precedent and has acknowledged that this holding conflicts with the Second and Eleventh Circuits' rule that *uberrimae fidei* is entrenched federal precedent in the law of marine insurance. The conflict thus presented is of national importance to the uniformity and harmony of maritime law and to the marine insurance industry.

II.

Did the Court of Appeals err as a matter of law in interpreting the Texas state insurance statute on misrepresentations, Texas Ins. Code Ann. art. 21.16 (Vernon 1981), in direct conflict with the Supreme Court of Texas' decision in *Robinson vs. Reliable Insurance Co.*?

LIST OF PARTIES

The following are parties to this proceeding:

Albany Insurance Company
Plaintiff-Petitioner

Anh Thi Kieu
Defendant-Respondent

Sabine Offshore Service, Inc.
Intervenor-Respondent

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Decisions Below

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 927 F.2d 882 (5th Cir. 1991). The District Court's opinion after trial was not reported. The District Court's written findings of fact, conclusions of law, judgment, and orally assigned reasons are reproduced in the Appendix.

Jurisdiction

This Petition seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit, entered on April 5, 1991. After its entry, plaintiff-appellant petitioned for panel rehearing and petitioned for rehearing *en banc*. The Court of Appeals denied both petitions on May 20, 1991. On May 31, 1991, appellant-petitioner's motion for stay of the mandate, pursuant to Rule 41(b), FRAP, was granted.

This Petition is filed pursuant to 28 U.S.C. §2101(c), and involves the Court's jurisdiction under 28 U.S.C. §1254 and U.S. Const., Art. III, §2.

Statute Presented for Review

Petitioner's second question presented for review involves Texas Ins. Code Ann. art. 21.16 (Vernon 1981):

Art. 21.16 Misrepresentation by Policyholder

> Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall

> render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case.

STATEMENT OF THE CASE

In February 1988, Anh Thi Kieu, a Vietnamese immigrant who resides in Texas, attempted to secure marine hull insurance coverage on the F/V STACY MARIE, a sixty-five foot, wooden hull shrimping vessel. An independent insurance agent, the Edgar Coco Agency, Inc. of Marksville, Louisiana, submitted to Anh Thi Kieu an application for insurance coverage which Coco had requested from G & M Marine, Inc., New Orleans, Louisiana, an authorized underwriting and claims agent for Albany Insurance Company. The Edgar Coco Agency interviewed its customer, Anh Thi Kieu, completed the insurance application form, had Anh Thi Kieu sign the form, witnessed her signature, and forwarded the application to G & M Marine, Inc. On March 1, 1988, Albany approved coverage of the STACY MARIE and forwarded a policy to Anh Thi Kieu.

The application for insurance had printed above the signature space in bold capitals, "Please Review Both Sides Carefully Before Signing Because False Information May Void Your Insurance." Above the capitalized sentence, the following was printed in regular type: "Signing this form does not bind the owner to purchase the insurance or the Company to accept the risk, but is agreed

that this form shall be the basis of the contract should a policy be issued."

It is undisputed that Anh Thi Kieu's application for insurance coverage contained several false statements. Among other things, Anh Thi Kieu recited (1) that she regularly operated the STACY MARIE as captain, (2) that the vessel had sustained no damages in the last five years, and (3) that she had purchased the vessel for $110,000 in 1987. In truth, Anh Thi Kieu purchased the STACY MARIE in 1984 for $30,000 and assembled an independent crew to guide the vessel in fishing and shrimping operations off the coast of Port Arthur, Texas. Furthermore, in late 1984, the STACY MARIE had collided with an offshore vessel and suffered damages that were repaired by a shipyard in Freeport, Texas.

After issuance of the policy in suit, during the night of November 3, 1988, the STACY MARIE struck an unmarked, offshore, Department of Energy platform. The trial court held that the allision damaged the hull planking on the vessel and opened a gaping hole in her port bow.

After being notified by the broker, Coco Agency, that the vessel had suffered an allision, Albany investigated the casualty and, thereafter, filed a declaratory judgment action.

Trial before the district judge, in admiralty, was held on February 8, 1990, and at the completion of trial the district judge orally assigned reasons for judgment, and requested that Anh Thi Kieu's counsel prepare written findings.

The insurance policy defenses raised by Albany below were numerous, including the breach of a specific

"Owner on Board" warranty; however, the bases of this Petition are two:

> (a) The Court of Appeals' blunt denial of the doctrine of *uberrimae fidei* (duty of utmost good faith, to disclose material facts) as entrenched federal precedent in marine insurance conflicts with the Second and Eleventh Circuits, and
>
> (b) The Court of Appeals' interpretation of a Texas insurance statute, Texas Ins. Code Ann. art. 21.16 (Vernon 1981) in direct contradiction of the Texas Supreme Court.

Petitioner requested panel rehearing and rehearing *en banc* in the Fifth Circuit, which were denied on May 20, 1991.

The Fifth Circuit's opinion admits that it is now in conflict with the Eleventh Circuit (and *sub silentio* the Second Circuit) on the *uberrimae fidei* issue. The panel opinion clearly states its intent to "untie the Gordian knot" of choice of law issues in marine insurance disputes, as produced this Court's decisions in *Wilburn Boat* and *Kossick*.

ARGUMENT

a) Background

Unless this Court wishes to revisit its decisions in *Wilburn Boat Co. vs. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) and *Kossick vs. United Fruit Co.*, 365 U.S. 731 (1961), the simple rule in marine insurance is that "entrenched" federal maritime precedent developed in marine insurance cases supersedes state insurance statutes.

This rule is to promote the Constitutionally man-

ated uniformity in admiralty, while recognizing the States' historical interest in regulating insurance. The Court of Appeals' decision seemingly acknowledges that rule, even though it does explicate it by reference to three factors (927 F. 2d at 886) which suggests some balancing of interests between federal uniformity and state individuality is included in a calculus separate from determining what is or is not "entrenched" precedent.

The desire for uniformity in national and international admiralty law, particularly marine insurance law, has frequently been the touchstone of this Court's decisions, e.g., *Queen Ins. Co. vs. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924); *Knickerbocker Ice Co. vs. Stewart*, 253 U.S. 149, 157-161 (1920), and has been called the "reverse-Erie" principle, *Chick Kam Choo vs. Exxon Corp.*, 486 U.S. 140, 149 (1988).

Marine Insurance is so unquestionably a significant element of this Court's admiralty and maritime jurisdiction that Gilmore & Black refer to it as the foundation of admiralty jurisprudence in the United States, G. Gilmore & C. Black, *The Law of Admiralty*, 53 (2d ed. 1975); *see also:* E.P. Deutsch, *Development of the Theory of Admiralty Jurisdiction in the United States*, 35 Tul. L.Rev. 117 (1960); and Justice Story's early exegesis on marine insurance and admiralty law in *DeLovio vs. Boit*, 7 Fed. Cas. 418 (C.C.D. Mass. 1815) (No. 3776), was later praised and approved in *Insurance Co. vs. Dunham*, 78 U.S. (11 Wall.) 1, 31, 35 (1870).

The particular doctrine of *uberrimae fidei* is statutorily confirmed in British marine insurance law in the Marine Insurance Act, 1906 (6 Edw. 7 c. 41), sections 17 - 20, and has consistently been applied in British jurisprudence from before our independence, e.g. *Carter vs.*

Boehm, 3 Burr. 1905, 97 Eng. Rep. 1162 (K.B. 1766), to the current day, e.g. *Container Transport Int'l Inc. vs. Oceanus Mutual Underwriting Assoc. (Bermuda) Ltd.*, [1984] 1 Lloyd's L.R. 476, 489-497 (C.A. 1984).

Chief Judge Brown cited the classic definition of *uberrimae fidei*, in *Gulfstream Cargo, Ltd. vs. Reliance Ins. Co.*, 409 F.2d 974, 981 n. 20 (5th Cir. 1969) as: "The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight;" and in referring to this duty to disclose material facts, Chief Judge Tuttle stated "Nothing is better established in the law of marine insurance," *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 646 (5th Cir. 1962), *cert. denied*, 370 U.S. 925 (1962).

b) Prior Fifth Circuit Law

The assured's duty to disclose material facts, or *uberrimae fidei*, was approved by Chief Judges Tuttle and Brown in the strongest terms in *Fireman's Fund* and *Gulfstream Cargo*. Likewise, in *D.J. McDuffie, Inc. vs. Old Reliable Fire Ins. Co.*, 608 F.2d 145, 147 n. 1 (5th Cir. 1980), *cert. den.*, 449 U.S. 830 (1980); and *Continental Oil Co. vs. Bonanza Corp.*, 677 F.2d 455, 461 n.7 (5th Cir. 1982), *vacated on rehearing on other grounds*, 706 F.2d 1365 (5th Cir. 1983), the Fifth Circuit had held that when admiralty speaks to a question, state law cannot override it.

However, in the instant appeal those authorities, plus the recent case of *Austin vs. Servac Shipping Line*, 794 F.2d 941 (5th Cir. 1986), were dismissed as mere dicta or placed in a strange catagory of cases which "conclude," but do not "authoritatively conclude," that the doctrine is entrenched precedent, 927 F.2d at 889.

Petitioner's request that the Fifth Circuit grant a rehearing *en banc* was denied, with no judge in regular active service having requested a poll; therefore, it appears well settled that the panel opinion is now the law of the Fifth Circuit. As stated in the opinion:

> "Perhaps the doctrine [uberrimae fidei] was entrenched federal precedent at the time of the *Fireman's Fund Insurance Co.* and *Gulfstream Cargo, Ltd.* decisions, but its spotty application . . .suggests that [it] is entrenched no more." 927 F.2d at 889-890.
>
> * * *
>
> "We therefore conclude, albeit with some hesitation, that the *uberrimae fidei* doctrine is not 'entrenched federal precedent.' " 927 F.2d at 889.

The panel opinion went on to suggest that *uberrimae fidei* might be applied in "appropriate cases" in the future, even when it conflicts with state law, but there is no intellectually consistent way to mask the panel's obvious holding that *uberrimae fidei* is *not* "entrenched" under the analysis mandated by this Court in *Wilburn Boat.*

c) *Uberrimae Fidei* In Other Circuits

In *Steelmet, Inc. vs. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984) and in *Kilpatrick Marine Piling vs. Fireman's Fund Ins. Co.*, 795 F.2d 940, 942 (11th Cir. 1986) the Eleventh Circuit held that it recognized the doctrine of *uberrimae fidei* as the "controlling rule even in the face of contrary state authority" in marine insurance.

The Fifth Circuit's comment, 927 F.2d at 889 n.6, that the Eleventh Circuit retreated from this position in

King vs. Allstate Ins. Co., 906 F.2d 1537, 1540 (11th Cir. 1990) is incorrect because the decision in *King* turned upon the parties' contractual freedom to "contract out" or "contract around" the otherwise applicable federal law of *uberrimae fidei* in marine insurance. 906 F.2d at 1539-1541. No such special circumstances are applicable to this case.

The Second Circuit indisputably recognizes the doctrine of *uberrimae fidei* as entrenched federal precedent, superseding state insurance statutes, in marine insurance. *Ingersoll Mill. Mach. Co. vs. M/V Bodena*, 829 F.2d 293, 305, 308 (2d Cir. 1987); *Knight vs. U.S. Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Puritan Ins. Co. vs. Eagle S.S. Co.*, 779 F.2d 866, 870-871 (2d Cir. 1985); *Btesh vs. Royal Ins. Co.*, 49 F.2d 720, 721 (2d Cir. 1931).

If the rule of *uberrimae fidei* appears harsh on the assured, the assured's recourse is against its marine broker and the broker's E & O insurer, *see e.g., Royal Ins. Co. vs. Cathy Daniels, Ltd.*, 684 F.Supp. 786 (S.D.N.Y. 1988). The broker (Edgar Coco Agency, Inc.) for Anh Thi Kieu is no stranger to federal court, *see Premium Finance Co., Inc. vs. Employers Reinsurance Corp.*, 745 F.Supp. 375 (W.D.La. 1990).

The Ninth Circuit has applied *uberrimae fidei*, specifically sections 17 and 18 of the British Marine Insurance Act, 1906, per contractual stipulation, in *Pacific Queen Fisheries vs. Symes*, 307 F.2d 700, 706-709 (9th Cir. 1962).

Uberrimae fidei is routinely cited by district courts in marine insurance cases as a controlling maritime law principle, *e.g., Port Lynch, Inc. vs. New England Int'l Assurety of America, Inc.*, 754 F.Supp. 816, 822 (W.D.

Wash. 1991); *Hartford Ins. Co. vs. Garvey,* 1989 A.M.C. 652, 656 (N.D. Cal. 1988); *Albany Ins. Co. vs. Wisniewski,* 579 F.Supp. 1004, 1014-1015 (D.R.I. 1984); *Thebes Shipping, Inc. vs. Assicurazioni Ausonia SPA,* 599 F.Supp. 405, 426-427 (S.D.N.Y. 1984).

There is simply no way to reconcile the Fifth Circuit's position with marine insurance practice and law in the rest of the United States. It is beyond peradventure that the marine insurance industry, including its assureds, are entitled to a resolution of this conflict on the question of what does or does not void a policy of insurance *ab initio.*

d) Admiralty Uniformity

"The overriding concern of the maritime law is the federal interest in the need for a uniform development of the law governing the maritime industries," *Palmer vs. Fayard Moving & Transp. Corp.,* 930 F.2d 437, 441 (5th Cir. 1991), citing the majority in *Foremost Ins. Co. vs. Richardson,* 457 U.S. 668, 677 (1982).

"Admiralty is a specialized area of law that, since its ancient inception, has been concerned with the problems of seafaring commercial activity," *Foremost Ins. Co. vs. Richardson,* 457 U.S. 668, 679 (Powell, J., dissenting).

The exceptional importance of the doctrine of *uberrimae fidei* is emphasized by all commentators on both sides of the Atlantic.

In America, 1 A. Parks, *The Law and Practice of Marine Insurance and Average,* 216 (1987) states:

> "A marine insurance policy is unquestionably *uberrimae fidei* - of the utmost good faith-and

> may be avoided by the injured party where the other fails to exercise the utmost good faith required."

In the British Isles, 2 Arnould, *Law of Marine Insurance and Average* §§579 and 580 (16 ed. 1981) and E. Ivamy, *Marine Insurance* 39-40 (4th ed. 1985) citing Section 17 of the British Marine Insurance Act, 1906 state:

> "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

As *Ivamy* goes on to state, at 41:

> "The duty of making a full disclosure of material circumstances lies on the assured, whether the insurance is effected by himself or by an agent.
>
> * * *
>
> "The agent must be as diligent in disclosure as his principal, and all persons are connecting links - either as owners or agents - between the thing insured and the insurer, and must pass their knowledge from one to another with the utmost assiduity until the information reaches the insurer."

See, also: E. Ivamy, *Chalmers' - Marine Insurance Act 1906,* 25-33 (8th ed. 1976); R. Brown, *Marine Insurance-Principles & Basic Practice* 85-90 (5th ed. 1986); R. Lambeth, *Templeman on Marine Insurance,* 19-22 (5th ed. 1981).

The Marine Insurance Act, 1906 and British

maritime jurisprudence are generally accepted as persuasive authority in American courts as to marine insurance doctrine, *e.g. Calmar S.S. Corp. vs. Scott*, 345 U.S. 427, 442-443 (1953); *Lenfest vs. Coldwell*, 525 F.2d 717, 724 n. 15 (2d Cir. 1975).

This Court has often approved the parallel development of British and American admiralty law. In *The Eliza Lines*, 199 U.S. 119, 128 (1905), Mr. Justice Holmes said: "Of course it is desirable, if there is no injustice, that the maritime law of this country and of England should agree"; and in *Queen Ins. Co. vs. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924) Justice Holmes reiterated: "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business."

The doctrine of *uberrimae fidei* in marine insurance as an entrenched concept certainly has a long pedigree in this Court. In *McLanahan vs. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 185 (1828) this Court reviewed hull insurance on the brig *Creole*, bound from Harve de Grace, via Havana, to New Orleans. Mr. Justice Story found the insurance to be a contract of *uberrimae fidei*. The doctrine of *uberrimae fidei* in marine insurance was also upheld in *Sun Mutual Ins. Co. vs. Ocean Ins. Co.*, 107 U.S. (17 Otto) 485, 510 (1882) involving marine insurance and reinsurance.

In *Wilburn Boat Co. vs. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) this Court decided that the general maritime law on breach of warranty in a marine insurance policy would not supersede a Texas insurance statute on warranties regarding the fire loss of a small houseboat confined to a landlocked, artificial lake on the Texas - Oklahoma border. However, the Court denied *certiorari* when, after remand and retrial, the Court of Appeals applied both article 21.16 of the Texas insurance code and

cited *uberrimae fidei* as entrenched federal precedent to deny coverage to the same claim because of failure to disclose material facts, *Fireman's Fund Insurance Co. vs. Wilburn Boat Co.*, 300 F.2d 631, 646-647 (5th Cir. 1962), *cert. denied*, 370 U.S. 925 (1962), *rehearing denied*, 371 U.S. 854 (1962).

e) Texas Ins. Code Ann. Art. 21.16

If the Court of Appeals' decision on *uberrimae fidei* is not reversed, then the *sine qua non* of Anh Thi Kieu's recovery on Albany's insurance policy is the Court of Appeals' incorrect reading of the Texas insurance statute on misrepresentations and concealment.

The Court of Appeals held "Under Texas law, an assured's misrepresentation may invalidate the policy of insurance, but only if the misrepresentations contributed to the destruction of the insured property. Tex. Ins. Code Ann. art. 21.16 (Vernon 1981)," 927 F.2d at 887.

Article 21.16 of the Texas state insurance code is clearly phrased in the disjunctive, requiring an insurer to prove *either* misrepresentation of facts *material to the risk or* misrepresentation of facts which *actually contribute* to the casualty.

Petitioner brought this to the attention of the Court of Appeals; so did amicus curiae, The Maritime Law Association of the United States, and Highlands Insurance Co., in their briefs.

The Texas Supreme Court has clearly held this to be the correct interpretation in *Robinson vs. Reliable Insurance Co.*, 569 S.W.2d 28, 30 (Texas 1978), and specifically discussed and disapproved the contention that

an "and" should be substituted for the "or." The Texas Supreme Court stated "a contrary construction would leave the requirement of materiality without meaning," 569 S.W. 2d at 30.

Petitioner is aware that this Court has often referred to a general policy that it would leave undisturbed a holding on a question of state law by a federal appeals court when that court included a judge who is a lawyer of the state in question, *Spiegel's Estate vs. Commissioner,* 335 U.S. 701, 708 (1949), or when the holding was an affirmance of the judgment of a federal district court sitting in the state, *Steele vs. General Mills, Inc.,* 329 U.S. 433 (1947); but, that policy is premised on the lack of a state court pronouncement which directly controls the question, *General Box Co. vs. United States,* 351 U.S. 159, 165 (1956).

The Court of Appeals' error in misreading this Texas statute, in substituting "and" for "or" on so crucial a point as the requirements for voiding an insurance policy, *ab initio,* is so clearly a contradiction of that State's highest court that it must be corrected by this Court. Such an egregious usurpation of the duty of Texas state courts to interpret Texas state statutes should not stand.

The Court of Appeals specifically avoided ruling on or expressing an opinion on Albany's appeal of the District Court's ruling on "materiality" *vel non* of the assured's misrepresentations, 927 F.2d at 889 n. 5 "[b]ecause we conclude that the Texas Insurance Code governs the instant action." *Id.*

Therefore, correction by this Court of the Court of Appeals' errors on the *uberrimae fidei* issue or the misreading of article 21.16, would require that Albany's

appellate arguments on "materiality" be decided below. Of course, Albany submits that an assured's misrepresentations as to loss history, purchase price, and captaining of a commercial fishing vessel would have to be categorized as "material" in light of the record made in this case at trial.

CONCLUSION

As Gilmore and Black succinctly explain:

> "The marine insurance contract is *uberrimae fidei* - the highest degree of good faith is exacted of those entering it, for the underwriter often has no practicable means of checking on either the accuracy or the sufficiency of the facts furnished him by the assured before the risk is accepted and the premium and conditions set."

G. Gilmore and C. Black, *The Law of Admiralty* 62 (2d ed. 1975).

A doctrine so basic to the marine insurance industry should not be the subject of a continuing conflict among the Circuits.

Second, the Court of Appeals' decision conflicts with the latest decision of the Texas Supreme Court anent the interpretation of Article 21.16 of the Texas Insurance Code.

Resolution of such conflicts is essential to the continued orderly conduct and development of the marine commerce of the nation.

For the foregoing reasons, it is respectfully submitted that certiorari should be granted.

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June, 1991

APPENDIX A

ALBANY INSURANCE COMPANY,
Plaintiff-Appellant,

v.

ANH THI KIEU,
Defendant-Appellee.

No. 90-4218.

United States Court of Appeals

Fifth Circuit.

April 5, 1991.

Marine insurer brought action seeking declaration of insured's rights in policy. The United States District Court for the Eastern District of Texas, Joe J. Fisher, J., declared that insured should recover insured value of vessel minus salvage value of vessel's hull and ordered that insured recover "sue and labor" charges to cover storage fees of damaged vessel. Insurer appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) state law, rather than federal uberrimae fidei law, applied; (2) Texas insurance law, rather than Louisiana insurance law, applied; (3) insured's misrepresentations did not invalidate policies; and (4) insured's breaches of express warranties did not constitute defense to recovery under policy.

Affirmed.

Appeal from the United States District Court for the Eastern District of Texas.

Before JOHNSON, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

JOHNSON, Circuit Judge:

Oblivious to the tangled mess it has left the practitioner to decipher, this Court has extended numerous—and often seemingly inconsistent—explanations of the appropriate choice of law in marine insurance disputes. Our task in the instant appeal is to untie the Gordian knot. Albany Insurance Company ("Albany") challenges the district court's declaration that appellee Anh Thi Kieu recover some $90,405 in damages and "sue and labor" charges under a marine insurance contract. The district court determined that Texas insurance law, and not federal maritime or Louisiana insurance law, governed the parties' rights and obligations. Unable to conclude that the district court committed reversible error, this Court affirms the judgment of the district court.

I. FACTS AND PROCEDURAL HISTORY

In February 1988, Anh Thi Kieu, a Vietnamese immigrant who resides in Texas, attempted to secure marine hull insurance coverage on the F/V STACY MARIE, a sixty-five foot shrimping vessel. An independent agent, the Edgar Coco Agency, Inc. of Marksville, Louisiana, submitted to Anh Thi Kieu an application for insurance coverage from Albany Insurance Company. Although it was printed in English, Anh Thi Kieu completed the application. The Edgar Coco Agency forwarded the application to Albany's general agent, G & M Insurance Company. On March 1, 1988, Albany approved coverage of the STACY MARIE and forwarded a policy to Anh Thi Kieu.[1]

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[1] The insurance policy designates the name of the covered vessel as the

It is undisputed that Anh Thi Kieu's application for insurance coverage contained several inaccurate statements. Among other things, Anh Thi Kieu recited (1) that she regularly operated the STACY MARIE as captain, (2) that the vessel had sustained no damages in the last five years, and (3) that she had purchased the vessel for $110,000. In truth, Anh Thi Kieu purchased the STACY MARIE in 1984 for $30,000 and assembled an independent crew to guide the vessel in fishing and shrimping operations off the coast of Port Arthur, Texas. Late in 1984, the STACY MARIE collided with an offshore repair boat and suffered minor damage that was repaired by a marine shipyard in Freeport, Texas. Albany Insurance Company had ample opportunity to discover these facts and cancel coverage. Instead, Albany continued to receive premiums from Anh Thi Kieu and to extend coverage on the STACY MARIE.

On November 3, 1988, the STACY MARIE allided with an unmarked offshore Department of Energy platform. The allision damaged the hull planking on the vessel and opened a gaping hole on its port bow. Assisted by the Coast Guard and another shrimp boat, the crew of the STACY MARIE successfully floated the vessel to Sabine Pass, Texas. There, Sabine Offshore Services, Inc. ("Sabine Offshore"), agreed to place the STACY MARIE in dry storage in its dock yard. Anh Thi Kieu apparently secured these dry storage arrangements with Sabine Offshore in an effort to "save and preserve" the STACY MARIE.

Footnote 1 continued

"STACEY MARIE." Both parties in their briefs, however, refer to the vessel as the "STACY MARIE." For the sake of consistency, we will adopt the second spelling.

After learning from Anh Thi Kieu that the vessel had suffered an allision, Albany investigators surveyed the damage. The investigators recommended that Albany deny any liability under the marine hull insurance policy. Subsequently, Albany filed a declaratory judgment action in federal district court requesting a declaration of Anh Thi Kieu's rights in the policy. The district court entered findings of fact and conclusions of law on February 21, 1990. The court declared that Anh Thi Kieu should recover the insured value of the STACY MARIE ($90,000) minus the salvage value of the vessel's hull ($15,000)—a total of $75,000 in damages. In addition, the court ordered that Anh Thi Kieu recover $15,405 in "sue and labor" charges—an amount intended to cover the storage fees at Sabine Offshore.

II. DISCUSSION

[1] Albany raises a number of arguments on appeal. The most significant of these arguments attack the district court's application of Texas insurance law. Albany argues that the district court erroneously applied Texas insurance law and instead should have applied the federal law of *uberrimae fidei*. In the alternative, Albany argues that the district court should have applied Louisiana insurance law instead of Texas insurance law. Maritime commerce traverses the waters of many states. A set of facts in a maritime case could conceivably implicate the laws of several states, as well as the federal laws of the United States. Thus, in determining the applicable law, a court first must consider whether federal maritime law is preeminent, and then often must also consider whether one state's law is applicable over another state's law. We begin with the federal preemption analysis.

A. *Maritime Preemption*

[2] Albany contends that the federal law of *uberrimae fidei*, which invalidates marine insurance contracts on evidence of the assured's material misrepresentations to the underwriter, supports its denial of liability on the policy covering the STACY MARIE. Anh Thi Kieu responds that relevant provisions of the Texas Insurance Code preclude Albany's denial of coverage. The issue is simply stated, but the law is complex: does federal maritime law or state insurance regulation determine the effect of an assured's misrepresentations? Although the courts typically rely upon federal common law to resolve maritime disputes, state law occasionally can be used to supplement or even supersede maritime law. *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577, 582 (5th Cir.1986); *J. Ray McDermott & Co. v. The Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 948, 93 S.Ct. 271, 34 L.Ed.2d 218 (1972).[2] State law is particularly significant in marine insurance disputes.

[3-5] In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368,99 L.Ed. 337 (1955), the United States Supreme Court concluded that the regulation of marine insurance is, in most instances, properly left with the states. *Id.* at 321, 75 S.Ct. at 374-75. Following the direction of the Court in *Wilburn Boat*, the Fifth Circuit has ruled "the interpretaion of a contract of marine insurance is—in the absence of a specific and controlling federal rule—to be determined by reference to

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[2] It is well settled that a marine insurance policy is a maritime contract within federal admiralty jurisdiction. *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 428 n. 4 (5th Cir.1980); *Irwin v. Eagle Star Ins. Co.*, 455 F.2d 827, 829 (5th Cir.), *cert. denied*, 409 U.S. 852, 93 S.Ct. 118, 34 L.Ed.2d 95 (1972).

appropriate state law." *Ingersoll-Rand Financial Corp. v. Employers Ins. of Wausau*, 771 F.2d 910, 912 (5th Cir.1985). This presumption of state law is, by now, "axiomatic." *INA of Texas v. Richard*, 800 F.2d 1379, 1380 (5th Cir.1986). State law, therefore, governs the interpretation of marine insurance policies unless an available federal maritime rule controls the disputed issue. This Circuit has identified three factors that a court should consider in determining if a federal maritime rule controls the disputed issue: (1) whether the federal maritime rule constitutes "entrenched federal precedent," *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 633 (5th Cir.), *cert. denied*, 370 U.S. 925, 82 S.Ct. 1562, 8 L.Ed.2d 505 (1962); (2) whether the state has a substantial and legitimate interest in the application of its law, *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 429 (5th Cir.1980); (3) whether the state's rule is materially different from the federal maritime rule, *Walker & Sons, Inc. v. Valentine*, 431 F.2d 1235, 1239 (5th Cir.1970). *See Kossick v. United Fruit Co.*, 365 U.S. 731, 738-39, 81 S.Ct. 886, 891-92, 6 L.Ed.2d 56 (1961).[3] These factors are merely instructive and not dispositive. We address them in reverse order.

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[3] Our Circuit has taken varying, and arguably inconsistent, approaches to the precedential authority of *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961). In at least one opinion, this Court assumed that *Kossick* essentially limited *Wilburn Boat* to its factual scenario. *McDuffie v. Old Reliable Fire Ins. Co.*, 608 F.2d 145, 147 n. 1 (5th Cir.1979). In another case, however, the Court severely criticized and declined to follow the Kossick opinion, concluding that it only contributed confusion to the question whether maritime law controlled the interpretation of marine contracts. *Irwin v. Eagle Star Ins. Co.*, 455 F.2d 827, 829-30 (5th Cir.), *cert. denied*, 409 U.S. 852, 93 S.Ct. 118, 34 L.Ed.2d 95 (1972). Still other cases ignore *Kossick* altogether. *See, e.g., Transco Exploration Co. v. Pacific Employers Ins. Co.*, 869 F.2d 862, 863 (5th Cir. 1989) (applying *Wilburn Boat* standard without reference to *Kossick*); *INA of Texas*, 800 F.2d at 1380 (same).

[6-8] *State insurance law generally should not govern marine insurance disputes if it is materially different from federal maritime law.* The application of state law inconsistent with the core principles of maritime law "would defeat the reasonably settled expectations of maritime actors." *Exxon Corp. v. Chick Kam Choo,* 817 F.2d 307, 318 (5th Cir.1987), *rev'd on other grounds,* 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). While there is no requirement that state insurance regulations precisely mirror parallel federal regulations, state law should not be applied unless it bears a reasonable similarity to the federal maritime practice. We find a reasonable similarity between the applicable federal and state laws in the instant case. Under the *uberrimae fidei* doctrine, an assured's material misrepresentations invalidate the policy of insurance *ab initio. Gulfstream Cargo, Ltd. v. Reliance Ins. Co.,* 409 F.2d 974, 980-81 & n. 20 (5th Cir. 1969). Under Texas law, an assured's misrepresentations may invalidate the policy of insurance, but only if the misrepresentations contributed to the destruction of the insured property. Tex.Ins. Code Ann. art. 21.16 (Vernon 1981). Texas law, unlike federal law, imposes an appropriate limitation that relatively minor misstatements which have no causal connection with the destruction of the property do not afford an excuse for nonpayment. The fundamental nature of both laws, however, is the same. Texas insurance law shares the

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Footnote 3 continued.

We find no need to either chastise or ignore *Kossick.* Like *Wilburn Boat, Kossick* agrees that, in the absence of a specific and controlling federal rule, state law governs marine contracts. 365 U.S. at 742, 81 S.Ct. at 894. *Kossick* instructs that the determination whether a federal rule is specific and controlling is not a mechanical endeavor. In particular, a reviewing court must consider the influence of the doctrines of federal supremacy and uniformity of laws. *Id.* at 738, 81 S.Ct. at 891-92. These doctrines are subsumed within the three factors which this Court has concluded are instructive on the question whether a federal maritime rule controls a disputed issue.

concern of federal maritime law that an assured should not profit from her material misrepresentations to the underwriter.

[9] *State insurance law generally should not govern marine insurance disputes if the state does not have a substantial and legitimate interest in the application of its law.* Federal maritime law properly controls any maritime dispute in the absence of a substantial and legitimate state interest. Stated conversely, state law should not be applied unless the local state interest materially exceeds the comparative maritime concerns in the controversy. *See Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469, 477, 42 S.Ct. 157, 158, 66 L.Ed. 321 (1922); *Walter v. Marine Office of America,* 537 F.2d 89, 94-95 (5th Cir. 1976). It is evident in the instant case that the local state interest is substantial and legitimate. Regulation of insurance relationships, including marine insurance relationships, has historically been a matter of state concern. *See Wilburn Boat Co.,* 348 U.S. at 316, 75 S.Ct. at 371. From their experience, states are far better equipped to balance the risks that each party to an insurance contract endures. The State of Texas has concluded that the burden of unrelated misrepresentations should fall on the insurance underwriter. Texas has a material interest in ensuring that marine insurance underwriters do not invalidate the insurance protection of Texas citizens on the basis of misrepresentations that had no relation to the event which triggers the need for compensation.

[10,11] *State insurance law generally should not govern marine insurance disputes if an existing federal maritime rule constitutes "entrenched federal precedent."* Maritime law, as federal common law, supersedes state law if the maritime law specifically governs the conduct in question and consistently has been invoked to control such conduct. In the absence of preexisting entrenched

federal maritime law, this Court will refuse to impose unfamiliar federal common law maritime requirements on the parties to a marine insurance contract. *See INA of Texas,* 800 F.2d at 1382 ("In case after case, we have applied state law in interpreting marine insurance policies, because there is no contrary federal admiralty rule."). The application of unfamiliar federal maritime rules engenders undesirable uncertainty among maritime actors; this Court can easily avoid such uncertainty by the application of "already well-developed state laws." *Chick Kam Choo,* 817 F.2d at 317.

The question whether the *uberrimae fidei* doctrine is entrenched federal precedent is troublesome. Repeated references to the doctrine appear in early United States Supreme Court opinions. *See e.g., Stipcich v. Metropolitan Life Ins. Co.,* 277 U.S. 311, 316, 48 S.Ct. 512, 513, 72 L.Ed. 895 (1928); *Phoenix Life Ins. Co. v. Raddin,* 120 U.S. 183, 189, 7 S.Ct. 500, 502, 30 L.Ed. 644 (1887). The Supreme Court applied the *uberrimae fidei* doctrine as a "traditional" aspect of insurance law in general. *See Stipcich,* 277 U.S. at 316, 48 S.Ct. at 513 ("Insurance policies are traditionally contracts uberrimae fidei and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option."). As mentioned, though, insurance law is typically a matter of state concern. Over the years most states abandoned the strict *uberrimae fidei* articulation. Today, the sole remaining substantial vestige of the doctrine is in maritime insurance law. *See* 2 Arnould, Marine Insurance & Average § 575, at 531 (13th ed. 1950); F. Tempelman & C. Greenacre, Marine Insurance 16-17 (4th ed. 1934); W. Winter, Marine Insurance 223 (3d ed. 1952).

Even under maritime law, the federal courts have rarely invoked the *uberrimae fidei* doctrine. Despite the long history of the doctrine in the Supreme Court, only

three cases—two of which date from the 1960s—have examined the availability of the doctrine in this Circuit. Each of these cases has confidently asserted that the doctrine is "well recognized" in federal law. Indeed, in *Fireman's Fund Insurance Co. v. Wilburn Boat Co.*, 300 F.2d 631 (5th Cir.1962), the Court expressly declared that the *uberrimae fidei* doctrine "is solidly *entrenched* in our body of federal maritime law." *Id.* at 647 n. 12 (emphasis added).[4] In *Gulfstream Cargo, Ltd. v. Reliance Insurance Co.*, 409 F.2d 974 (5th Cir.1969), the Court, relying extensively upon its language in *Fireman's Fund Insurance Co.*, stated without equivocation that "[n]othing is better established in the law of marine insurance than that 'a mistake or commission material to a marine risk, whether it be willful or accidental, or result from mistake, negligence or voluntary ignorance, avoids the policy.' " *Id.* at 980 (quoting *Fireman's Fund Insurance Co.*, 300 F.2d at 646). Each of these cases has declined, however, to enforce the strict *uberrimae fidei* rule as the basis for the invalidation of a marine insurance policy.

The circumstances in *Fireman's Fund Insurance Co.* and *Gulfstream Cargo, Ltd.* were unusual. In both cases, the Court assumed, without formally deciding, that the *uberrimae fidei* doctrine was controlling federal precedent. The Court nonetheless resolved each case on state law grounds, concluding that state insurance law would not permit the respective plaintiffs to recover under their marine insurance policies. In *Fireman's Fund Insurance Co.*, the Court remarked that, because Texas law would not

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[4] The Court's opinion in *Fireman's Fund Insurance Co.* was rendered on remand from the Supreme Court's reversal of this Circuit's original conclusion that a marine insurance contract should be interpreted under general maritime law requiring literal performance of warranties. 201 F.2d 833 (5th Cir.1953), *rev'd*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955).

afford relief anyway, the applicability of the *uberrimae fidei* doctrine was "of minimal significance." 300 F.2d at 647 n. 12. In *Gulfstream Cargo, Ltd.*, the Court echoed its prior opinion and conceded that it was "unnecessary" to further resolve the struggle between federal and state law in marine insurance disputes. 409 F.2d at 981.

The circumstances were equally unusual in the only other case in this Circuit to discuss the availability of the *uberrimae fidei* doctrine. In *Austin v. Servac Shipping Line*, 794 F.2d 941 (5th Cir.1986), the Court affirmed a district court's conclusion that the *uberrimae fidei* doctrine did not preclude the plaintiff's recovery under a marine hull insurance policy. The Court emphasized that, even if the doctrine existed, the *uberrimae fidei* doctrine did not require invalidation of the policy because the plaintiff's alleged misrepresentations were not "material." *Id.* at 944.[5] Consequently, like *Fireman's Fund Insurance Co.* and *Gulfstream Cargo Ltd.*, *Austin's* expression of the significance of the doctrine was mere dicta.

It is the accepted practice of this Court that one panel cannot overturn the decisions of another. *See Hodge v. Seiler*, 558 F.2d 284, 287 (5th Cir.1977); *Puckett*

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[5] The district court in *Austin* determined that the plaintiff's alleged misrepresentations were not material to the defendant underwriter's calculation of the risk. The Court concluded that the district court's finding was not clearly erroneous. *Austin*, 794 F.2d at 944. "A material fact is any fact, 'the knowledge or ignorance of which would naturally influence an insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance.' " *Id.* at 943 (quoting *Fireman's Fund Ins. Co.*, 300 F.2d at 640). Similarly, the district court in the instant case determined that Anh Thi Kieu's alleged misrepresentations were not material to Albany's calculation of the risk. Because we conclude that the Texas Insurance Code governs the instant action, we express no opinion concerning the propriety of the district court's determination that the misrepresentations were not material.

v. Commissioner, 522 F.2d 1385, 1385 (5th Cir.1975). None of the opinions of this Court which have cited the *uberrimae fidei* doctrine *authoritatively* conclude, however, that the doctrine applies to the exclusion of state law. For that matter, no opinion of this Court has ever explicitly authorized the application of the *uberrimae fidei* doctrine to invalidate a marine insurance policy. The *uberrimae fidei* doctrine, in sum, is a rule which this Court has recognized, *but never applied.* We therefore conclude, albeit with some hesitation, that the *uberrimae fidei* doctrine is not "entrenched federal precedent."

The facts in the instant case are analogous to the facts in the salient opinion of *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955). The marine insurance underwriter in *Wilburn Boat Co.* refused to pay for the loss of a houseboat because the plaintiffs allegedly had breached certain warranties in the insurance policy. The underwriter sought application of a so-called "strict" breach of warranty rule under general maritime law. The Supreme Court, however, viewed this maneuver with skepticism. Noting that there were "very few federal cases on marine insurance in which the strict breach of warranty rule has even been considered," the Court determined that the strict breach of warranty rule had not been firmly established as part of the body of federal law. *Id.* at 315-16, 75 S.Ct. at 371-72. Accordingly, the Court required the application of state law. *Id.* at 321, 75 S.Ct. at 374.

The same result should ensue here. There are very few cases on marine insurance in this Circuit which have considered the *ubberimae fidei* doctrine. Even when this Court has considered the doctrine, it has not applied the doctrine. Perhaps the doctrine was "entrenched federal precedent" at the time of the *Fireman's Fund Insurance*

Co. and *Gulfstream Cargo, Ltd.* decisions, but its spotty application in recent years—even in other circuits[6]—suggests that the *uberrimae fidei* doctrine is entrenched no more.

Concluding, as we do, that all three factors a court should consider in the marine insurance preemption analysis favor the application of state law, we therefore must examine the relevant state law to determine the viability of Anh Thi Kieu's request for compensation. But before we leave our discussion of the tug of war between federal and state law, we find it necessary to stress those decisions which we do *not* reach. This Court does not hold that federal maritime law no longer embraces the *uberrimae fidei* doctrine: while we have found no cases in this Circuit which apply the doctrine, we also have found no cases which expressly reject the doctrine. Neither does this Court hold that state insurance law always will supersede the *uberrimae fidei* doctrine. In an appropriate case, it is entirely possible that application of the doctrine would be more appropriate than application of the relevant state insurance regulations.[7]

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[6] We recognize that our sister circuit, the Eleventh Circuit, has concluded that the *uberrimae fidei* doctrine is well settled and "as a clear rule of maritime law it is the controlling federal rule even in the face of contrary state authority." *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir.1984). However, the Eleventh Circuit itself has retreated from this broad view and held that state law may in at least some circumstances control to the exclusion of the *uberrimae fidei* doctrine. *See King v. Allstate Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990) (parties to a marine insurance policy may agree to the application of state law).

[7] We need not at this time explore all of the situations in which application of the *uberrimae fidei* doctrine might be proper. It is sufficient to note that if the applicable state insurance law is materially different from the *uberrimae fidei* doctrine--*e.g.*, the state law requires that "all misrepresentations of the insured, whether or not material, invalidate the policy of insurance" or that "no misrepresentations of the insured, except those statements that the underwriter could not with due diligence discover were false, invalidate the policy of insurance"—the federal maritime law *might be* a more appropriate measure of the obligations of the assured.

B. *Choice of State Law*

[12,13] After concluding that federal maritime law does not govern the assured's right to payment on the marine insurance policy, we next must determine whether Texas or Louisiana Insurance law applies. Albany argues that, even if federal maritime law does not apply, the district court should have applied a similarly strict Louisiana law.[8] Although a federal court customarily applies the choice of law rules of the forum in which it is located, *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941), the court in maritime cases must apply general federal maritime choice of law rules. *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 880 n. 3 (5th Cir. 1987). *Cf. Hellenic Lines v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953). In this case, we must consider the choice of law rules which specifically govern marine insurance disputes.

The decisions of this Court that attempt to explain the proper choice of state insurance law governing the interpretation of marine insurance policies are seemingly in conflict. This Court has held that "the law of the state in which the [insurance] contract was formed" determines the parties' rights. *Graham v. Milky Way Barge, Inc.*, 811 F.2d 881, 885 (5th Cir.1987). It has held that "the law of the state where the marine insurance contract was issued and delivered is the governing law." *Elevating Boats, Inc. v. Gulf Coast Marine, Inc.*, 766 F.2d 195, 198 (5th Cir.1985).

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[8] Under Louisiana law, the insurance policy would be invalidated if the insured intentionally concealed or misrepresented a material fact during the application process. La. Rev. Stat. Ann. § 22:619 (West 1978 & Supp.1991); *see King v. Allstate Ins. Co.*, 906 F.2d 1537, 1539 (11th Cir.1990).

See also Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir.1976), *cert. denied*, 431 U.S. 967, 97 S.Ct. 2926, 53 L.Ed.2d 1063 (1977). It has held that "[i]n identifying the appropriate state law to apply, we look to the state having the greatest interest in the resolution of the issues." *Truehart v. Blandon*, 884 F.2d 223, 226 (5th Cir.1989). *See also Transco Exploration Co. v. Pacific Employers Ins. Co.*, 869 F.2d 862, 863 (5th Cir.1989). Considered separately under the circumstances of this particular appeal, these choice of law rules point the Court in entirely different directions: the contract was countersigned and therefore likely formed in Louisiana; it was issued in Louisiana but delivered in Texas; and Texas appears to have the greatest interest in the application of its law.

Nonetheless, we believe that we can reconcile these seemingly inconsistent choice of law rules. Modern choice of law analysis, whether maritime or not, generally requires the application of the law of the state with the "most significant relationship" to the substantive issue in question. *See* Restatement (Second) of Conflict of Laws § 6 (1980). In contract cases, courts must consider such factors as the place of formation of the contract and the place of negotiation of the contract to determine which states have sufficient contact with the transaction and the parties to support the application of their law. *Id.* § 188 (1971). However, the application of the most significant relationship approach does not simply turn on the number of contacts each state has with the controversy. The most significant relationship approach instead examines the relative interests of *all* of the states which share a sufficient relationship with the transaction and the parties. *Id.* § 6.

[14] We conclude that the first two choice of law rules this Court has applied in marine insurance disputes—requiring the application of the law of the state in which

the policy was formed or the law of the state in which the policy was issued and delivered—identify only the states which have sufficient contact with the policy and the parties that their laws *can* be applied. The third choice of law rule—requiring the application of the law of the state with the greatest interest—identifies the state law that *should* be applied. A federal court in a marine insurance dispute must apply the first two rules to isolate the "eligible" states; of these states, the court then must determine which state has "the greatest interest in the resolution of the issues." *Truehart,* 884 F.2d at 226.

A review of the first two choice of law rules reveals that both Texas and Louisiana have sufficient contact with the marine insurance policy and the parties to support the application of their insurance laws. Of these two states, Texas has a considerably greater interest in the application of its insurance code. Texas has a strong interest in the protection of its citizens, including Anh Thi Kieu, against the overbearing tactics of insurance underwriters. Louisiana's interest in the protection of citizens of foreign states is less significant. The insurance laws of Texas should have been applied, and appropriately, the district court so applied them. Albany's argument that Louisiana insurance law governs its dispute with Anh Thi Kieu lacks merit.

C. *Application of Texas Insurance Law*

1. Misrepresentations

[15,16] Under Texas insurance law, an insurer may invalidate a policy of insurance on the basis of the insured's misrepresentations in the insurance application only if the insurer can successfully plead and prove the following five elements: (1) the making of the representation; (2) the falsity of the representation; (3) reliance thereon by the insurer;

(4) the intent to deceive on the part of the insured in making same; and (5) the materiality of the representation. *Mayes v. Massachusetts Mutual Life Ins. Co.*, 608 S.W.2d 612, 616 (Tex.1980); *Southern Life & Health Ins. Co. v. Medrano*, 698 S.W.2d 457, 461 (Tex.App.—Corpus Christi 1985, writ ref'd n.r.e.). The unique aspect of this Texas law is the requirement that the insurer plead and prove the insured's intent to deceive. "[I]t is incumbent upon the insurer to prove that the insured made some material misrepresentation 'willfully and with design to deceive or defraud,' as an element of this [misrepresentation] defense." *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 756 (Tex.App.—Corpus Christi 1989, no writ). *See also Haney v. Minnesota Mutual Life Ins. Co.*, 505 S.W.2d 325, 328 (Tex.1974); *Allen v. American National Ins. Co.*, 380 S.W.2d 604, 607-08 (Tex.1964).[9]

[17] This Court, after a review of the record, is unpersuaded that the district court's rejection of Albany's misrepresentation defense requires reversal. Albany completely failed to fulfill its burden of proof. It offered absolutely no evidence that Anh Thi Kieu intended to deceive or defraud Albany. At most, Albany adduced evidence that Anh Thi Kieu, an immigrant who could not easily under-

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[9] In *Fireman's Fund Insurance Co. v. Wilburn Boat Co.*, 300 F.2d 631 (5th Cir.1962), this Court, attempting to interpret Texas insurance law, reckoned that the insured's "intent to deceive" was not an element of a misrepresentation defense. *Id.* at 646. Subsequent Texas Supreme Court decisions have revealed that the Court's interpretation in *Fireman's Fund Insurance Co.* was wrong. *See, e.g., Mayes v. Massachusetts Mutual Life Ins. Co.*, 608 S.W.2d 612, 616 (Tex.1980); *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604, 607-08 (Tex.1964). Since this Court, when required to interpret state law, is bound by the formulation of the law articulated by the highest court in the state, *see Ayo v. Johns-Manville Sales Corp.*, 771 F.2d 902, 909 n. 4 (5th Cir.1985), we conclude that our prior interpretation of the misrepresentation defense in *Fireman's Fund Insurance Co.* is no longer authoritative.

stand English, was careless in her completion of the insurance application. The negligence or carelessness of the insured in completing an application for insurance, however, does not support the invalidation of an insurance policy. "In short, false statements which are made negligently, carelessly or by mistake are not sufficient to avoid a[n] . . . insurance policy where the defense is based upon the insured's misrepresentation of a material fact." *Soto,* 776 S.W.2d at 756.

2. Breaches of Warranty

[18] Albany argues that, even if Anh Thi Kieu's misrepresentations in the insurance application do not invalidate the insurance policy, Anh Thi Kieu's breaches of certain express warranties in the insurance policy permit Albany to deny liability. The marine hull insurance policy contained two significant warranties: an owner aboard warranty, which warranted that Anh Thi Kieu would remain aboard the STACY MARIE at all times when the vessel was not safely in port, and a seaworthiness warranty, which warranted that Anh Thi Kieu would exercise due diligence to maintain the STACY MARIE in a seaworthy condition at all times during the life of the policy. Albany contends, and Anh Thi Kieu concedes, that the insured frequently was not aboard the STACY MARIE during its travels and especially was not aboard the STACY MARIE at the time of its allision with the Department of Energy platform. Albany further contends that at the time of the allision the STACY MARIE was not seaworthy because it was infested with marine toredo worms.

The Texas Insurance Code contains an "anti-technicality" provision which states that an insured's breach of warranty will not constitute a defense to an action on an insurance policy unless the breach caused or

contributed to the destruction of the insured property. Tex.Ins.Code Ann. art. 6.14 (Vernon 1981 & Supp.1990). It is clear in the instant case that Anh Thi Kieu's breaches of the owner aboard warranty and the seaworthiness warranty had no causal relationship with the STACY MARIE's accident. The fact that Anh Thi Kieu was not on board the STACY MARIE at the time of the allision with the Department of Energy platform, for instance, did not make the allision any more likely or possible. Her presence on the vessel could not have prevented the STACY MARIE's allision with an unmarked and unlighted platform. Similarly, the fact that the STACY MARIE suffered an infestation of marine toredo worms did not contribute to the destruction of the vessel. The district court specifically rejected Albany's theory that the worms contributed to the hole formed in the hull of the STACY MARIE after the allision, and the evidence at trial supported this factual finding.[10]

Albany contends that the Texas anti-technicality provision does not apply if the breach from its very nature could not contribute to the destruction of the insured property. We do not doubt that this is a correct statement of the law; however, this exception to the anti-technicality provision is not relevant here. It is certainly possible that, under a different set of circumstances, the breach of an owner aboard warranty or a seaworthiness warranty might contribute to the destruction of insured property. The district court's determination that Anh Thi Kieu's breaches did not contribute to the destruction of the STACY MARIE renders the Texas anti-technicality statue applicable.

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[10] Plaintiff's expert witness testified that there was evidence of toredo worms in the wooden hull of the STACY MARIE, but the infestation was light and did not contribute to the hole in the hull. Record Vol. III, at 160-61.

D. *Agency Status of Independent Marine Broker*

Albany argues that the district court improperly interpreted the scope of the Edgar Coco Agency's authority. Albany cites a comment the district court judge made during trial:

> To begin with, it appears to me that the boat owner, Anh Thi Kieu, has been somewhat taken advantage of and has suffered a great deal as a result of her experience as boat owner of the STACY MARIE . . . The Court feels that under the circumstances and considering the owner, [Ms.] Kieu that they [Albany] were not being exactly fair with her and they were being super technical.

Record Vol. III, at 205-07. Albany suggests that the district court inferred in these remarks that Anh Thi Kieu's misrepresentations, if any, were a result of the Edgar Coco Agency's strongarm tactics and that Albany ultimately is responsible for these tactics because the Coco Agency was its agent. Even if such vicarious liability were improper under Texas law—a questionable proposition[11]—we cannot conclude that Albany's interpretation of the district court's comment accurately reflects the court's intent. It is

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[11] It is not clear under Texas law whether an insurance broker is an agent of the insured or an agent of the underwriter. *Compare* Tex.Ins.Code Ann. arts. 21.02, 21.04 (Vernon Supp.1990) (conferring agency status on independent insurance companies that solicit policies from insurance carriers) *with Guthrie v. Republic Nat'l Ins. Co.*, 682 S.W.2d 634, 637 1:(Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (concluding that the "common law in this state does not permit a soliciting agent to bind the insurance carrier by his actions.") *and Don Chapman Motor Sales v. National Savings Ins. Co.*, 626 S.W.2d 592, 597 (Tex.App.—Austin 1982, writ ref'd n.r.e.) ("The rule is that although an insurance broker acts for the insured in making the application for insurance and in processing the policy, he acts for the insurer in delivering the policy and in collecting and remitting the premium.").

equally possible that the district court's remarks express frustration with Albany's "super technical" denial of Anh Thi Kieu's claim, rather than with the Edgar Coco Agency's abuse of its relationship with the plaintiff.

If harmful error, a district court's remarks during a bench trial certainly can necessitate reversal. Clearly, however, the idle remarks of the court during trial do not implicate the rights of the parties as much as the court's final decision. On appeal, the focus of our review of a bench trial remains the district court's finding of fact and conclusions of law. As Albany concedes, the findings of fact and conclusions of law do not reflect that the district court imposed on Albany *any* responsibility for the actions of the Edgar Coco Agency. On the contrary, the findings of fact and conclusions of law quite unmistakably suggest that, if there were any overbearing or belligerent acts in the period before the denial of Anh Thi Kieu's claim, they were Albany's. The district court's remarks at trial are not inconsistent with this conclusion.

E. *Calculation of Damages*

[19] Albany argues that the evidence does not support the district court's $75,000 damage award. In reviewing a court's determination of damages for the loss of a vessel, this Court accepts all factual findings unless they are clearly erroneous. *E.I. DuPont de Nemours & Co. v. Robin Hood Shifting & Fleeting Serv., Inc.*, 899 F.2d 377, 379 (5th Cir. 1990). In the instant case, the district court's factual findings are not clearly erroneous. Anh Thi Kieu's expert witness, Captain R.J. Underhill, testified at trial that the STACY MARIE was a complete loss with damages exceeding the $90,000 insured value. Further expert testimony established that the salvage value of the STACY MARIE was a mere $15,000. The plain and unam-

biguous provisions of the insurance policy stated that the assured was not required to pay a deductible in the event of a complete loss.[12] After consideration of this evidence, the district court properly could award Anh Thi Kieu recovery in the amount of the difference between the $90,000 insured value and the $15,000 salvage value.

Albany complains that the district court did not adequately consider the testimony of Albany's own expert witness, Kenneth J. Osborne. As factfinder in a bench trial, however, the district court was not obligated to accept or even credit the testimony of Albany's experts. *Pittman v. Gilmore,* 556 F.2d 1259, 1261 (5th Cir.1977) ("It is settled law that the weight to be accorded expert opinion evidence is solely within the discretion of the judge sitting without a jury. While he may not arbitrarily fail to consider such testimony, he is not bound to accept it.").

F. *Calculation of "Sue and Labor" Charges*

[20] The district court awarded Anh Thi Kieu "sue and labor" charges in the amount of $15,405, some $8,000 short of the $23,000 requested. Even so, Albany contends that the district court's award is excessive as a matter of law. Sue and labor expenses are sums spent by the assured in an effort to mitigate damages and loss. "The purpose of the sue and labor clause [in an insurance contract] is to reimburse the insured for those expenditures which are made primarily for the benefit of the insurer to reduce or

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[12] The insurance policy states in pertinent part:

The sum of $10,000.00 shall be deducted from the total amount of any or all claims (including claims for sue and labor, collision liability, general average and salvage charges) resulting from any one accident. *This deduction does not apply to claims for total or constructive total loss.*

Plaintiff's Exhibit No. 1 (emphasis added).

eliminate a covered loss." *Blasser Bros., Inc. v. Northern Pan-American Line,* 628 F.2d 376, 386 (5th Cir.1980).

[21] The district court's award of expenses under the sue and labor clause of an insurance contract is subject to the clearly erroneous standard of review. *Id.* The district court's award here withstands scrutiny. Testimony at trial suggested that the safest place for the STACY MARIE in light of its extensive damage was dry storage. If the vessel had not been stored, it likely might have capsized or sunk.[13] Accordingly, Anh Thi Kieu, in an effort to mitigate potential damages, placed the STACY MARIE in the dry dock at Sabine Offshore.[14] Anh Thi Kieu was entitled to reimbursement for these storage expenses; the court's award of $15,405 finds support in the evidence.[15]

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[13] The examination of Anh Thi Kieu's expert witness, Captain R. J. Underhill, is revealing:

ATTORNEY: In your expert opinion was it necessary to save and preserve the vessel to have her hauled out at Sabine Offshore at that time?
CAPTAIN UNDERHILL: Yes, sir.
ATTORNEY: Would she probably have sunk had they not hauled her out?
CAPTAIN UNDERHILL: She would have sunk.
Record Vol. III, at 177.

[14] It is curious that Albany should now complain that the storage expenses were excessive. Anh Thi Kieu continued to maintain the STACY MARIE in dry storage precisely because Albany repeatedly insisted that she save and preserve the vessel.

[15] A Sabine Offshore invoice noted a daily charge of $32.50 for storage. Intervenor's Exhibit No.2. The district court determined that this charge was reasonable. Concluding that the STACY MARIE had been in storage 474 days, the court calculated a total of $15,405 in sue and labor charges.

G. *Disposition of Bad Faith Counterclaim*

Both parties concede that the district court in its findings of fact and conclusions of law failed to dispose of Anh Thi Kieu's bad faith counterclaim against Albany. Anh Thi Kieu in this appeal abandons its counterclaim and asks this Court to conclude "that the assured's counterclaim is at minimum denied by implication." We have not discovered any authority for the proposition that the absence of a ruling on a party's claim is a denial of the claim by implication. We nonetheless conclude that under the particular facts of the instant case the district court's failure to dispose of the bad faith counterclaim does not require reversal. It would be a fruitless waste of judicial resources to remand a case for a ruling on a claim which the asserting party has effectively abandoned on appeal. *Cf. Allen v. Barnes Hosp.*, 721 F.2d 643, 644 (8th Cir.1983) (district court's failure to rule on constitutional arguments in bench trial is not error if the asserting party has waived the arguments).

III. CONCLUSION

Upon consideration of the relevant choice of law principles, this Court concludes that Texas insurance law, rather than federal maritime law or Louisiana insurance law, properly governs the instant marine hull insurance dispute. The provisions of the Texas Insurance Code require that Albany compensate Anh Thi Kieu for the losses incurred by the insured vessel. Finding no reversible error in the district court's actions, this Court affirms.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-4218

FILED
APR 05 1991

D.C. Docket No. B CA 89 00377

ALBANY INSURANCE COMPANY,
Plaintiff-Appellant,

versus

ANH THI KIEU,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

Before JOHNSON, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the cost on appeal to be taxed by the Clerk of this Court.

April 5, 1991

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4218

FILED
MAY 20 1991

ALBANY INSURANCE COMPANY,
Plaintiff-Appellant,

versus

ANH THI KIEU,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 5, 1991, 5 Cir., 198__, ____F.2d____)

(May 20, 1991)

Before JOHNSON, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member

of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

5-16-91

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
90 FEB 21

ALBANY INSURANCE	§	
COMPANY	§	CIVIL ACTION
V.	§	No.
	§	B-89-00377-CA
ANH THI KIEU	§	

FINAL JUDGMENT

On February 8, 1990, this action came on to be heard for trial before the Court. All parties announced ready for trial and all matters of fact and law were submitted to the Court. After consideration of the evidence presented, the stipulations of the parties, the pleadings on file, and the arguments of counsel, the Court hereby concludes that judgment should be entered for Defendant and Counter-Plaintiff, Anh Thi Kieu, against Plaintiff and Counter-Defendant, Albany Insurance Company, and that judgment should be entered in favor of Intervenor, Sabine Offshore Service, Inc., against Defendant, Anh Thi Kieu, herein in accordance with the Findings of Fact and Conclusions of Law simultaneously filed with this Final Judgment:

IT IS ORDERED, ADJUDGED AND DECREED that Anh Thi Kieu recover the sum of Seventy-Five Thoussand and No/100 Dollars ($75,000.00) from Albany Insurance Company, plus prejudgment interest at the rate of ten percent (10%) per diem beginning six (6) months after

November 3, 1988 to the date of this judgment;

IT IS FURTHER ORDERED that Anh Thi Kieu recover from Albany Insurance Company the sum of Fifteen Thousand Four Hundred Five and No/100 Dollars ($15,405.00), plus prejudgment interest at the rate of ten percent (10%) per diem beginning six (6) months after November 3, 1988 to the date of this judgment;

IT IS FURTHER ORDERED that Intervenor, Sabine Offshore Service. Inc., recover the sum of Fifteen Thousand Four Hundred Five and No/100 Dollars ($15,405.00) from Anh Thi Kieu, plus prejudgment interest at the rate of ten percent (10%) per diem beginning six (6) months after November 7, 1988 to the date of this judgment;

IT IS FURTHER ORDERED that Anh Thi Kieu and Sabine Offshore Service, Inc. are allowed all writs and processes provided by law to enforce this judgment.

IT IS FURTHER ORDERED that Anh Thi Kieu and Sabine Offshore Service, Inc. recover post-judgment interest on the total amount of judgment at the current statutory rate of 7.97 percent.

All costs of Court are to be taxed against Albany Insurance Company.

SIGNED this illegible day of February, 1990.

/s/ Illegible

United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
FEB 21 1990

ALBANY INSURANCE COMPANY	§	CIVIL ACTION
V.	§	No.
	§	B-89-00377-CA
ANH THI KIEU	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This declaratory judgment action filed by Albany Insurance Company to determine coverage of a marine hull policy came before the Court for trial on February 8, 1990. Trial was held before the Court without a jury. After considering the evidence presented at trial and the stipulations, the Court hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The F/V STACY MARIE is a 65-foot shrimping vessel of wood hull construction owned at all relevant times by Anh Thi Kieu.

2. On February 18, 1988, a representative of the Edgar Coco Agency presented to Defendant and procured the completion of an application for the vessel's hull insurance. Albany Insurance Company requested the Coco

Agency to secure the completion of this application for insurance. The application was completed by Anh Thi Kieu and forwarded to the G&M Marine Insurance Co., the general agent for Albany Insurance Company, and such application was approved by those companies and their representatives. No material misrepresentations were made by the vessel owner on the application of insurance.

3. On March 1, 1988, G&M Marine Insurance Company, on behalf of Albany Insurance Co., issued the hull policy No. 8H-15741 and had the Coco Insurance Agency deliver such policy to the vessel owner, Anh Thi Kieu. On April 22, 1988, a coverage and valuation survey was conducted by a marine surveyor appointed by underwriters. Coverage remained in full force and effect after this initial survey.

4. On November 3, 1988 the fishing vessel STACY MARIE sustained extensive losses to her hull as a result of an allision with an offshore stand-pipe in the Gulf of Mexico approximately five miles offshore.

5. On November 3, 1988, a high level bilge alarm switch was present inside a pipe in the bilge area of the F/V STACY MARIE. The actual audio alarm was located in the crew's quarters.

6. On November 7, 1988 the F/V STACY MARIE was towed to the Sabine Offshore Service, Inc.'s Sabine Pass dock. Pursuant to a contract between Sabine Offshore Service, Inc. and the vessel owner/insured, Anh Thi Kieu, the STACY MARIE was hauled out and stored on the Sabine Offshore dockyard premises. The travel lift charges of $520.00 and vessel storage charges of $32.50 per day charged by Sabine Offshore Service, Inc. are fair and reasonable for the services provided. These expenditures

were necessary in the owner's efforts to save and preserve the STACY MARIE pursuant to the owner's duty under the "sue and labor" clause of the hull policy.

7. The owner/insured, Anh Thi Kieu, gave timely notice of the claim to the insurer.

8. On November 9, 1988, G&M Marine, the Albany Insurance representative, forwarded a letter to the Edgar Coco Agency requesting them to notify the owner of the vessel of her obligation to save and preserve the vessel under the "sue and labor" clause.

9. On April 4, 1989, Albany Insurance Company, acting through its attorney, forwarded a letter to the Edgar Coco Agency, and the representative of the owner, Captain R. J. Underhill, requesting that the owner/insured be notified of her duty to save and preserve the vessel from further damage.

10. The record reflects this declaratory judgment was filed on May 10, 1989 by the insurer. Consequently, the insurer is estopped from denying liability for expenditures incurred by the owner in her acts to save and preserve the STACY MARIE from further peril. Representations to the vessel owner to save and preserve the vessel are inconsistent with denial of coverage.

11. Albany Insurance Company had full opportunity to verify any and all representations in the application for insurance or coverage process. The insurer could have chosen not to insure the STACY MARIE and/or could have cancelled coverage at any time prior to the date of loss. The insurer chose to accept the premiums and provide coverage to the STACY MARIE.

12. Coverage relating to the STACY MARIE losses was in full effect prior to, at the time of, and after the allision of November 3, 1988.

13. The F/V STACY MARIE was seaworthy at all times relevant to this cause of action.

14. The F/V STACY MARIE contains evidence of slight infestation of marine bore worms. Infestation of marine borers was not the proximate or contributing cause of the loss to the STACY MARIE.

15. The vessel owner, Anh Thi Kieu, was not aboard the vessel at the time of the casualty but her absence was not the proximate cause nor did such breach contribute in any way to the losses sustained by the STACY MARIE on November 3, 1988.

16. The four-inch hole in the port forward quarter of the STACY MARIE was caused solely by the vessel's allision with the offshore stand-pipe.

17. As a result of the November 3, 1988 allision, a substantial number of the F/V STACY MARIE's wood hull planking members have separated.

18. The F/V STACY MARIE has sustained damage to her wooden hull in the amount of $75,000.00 as a result of both the allision with the offshore standpipe and because of the insurer's delay in effectuating coverage of the loss so that the insured may initiate repairs to the vessel within a reasonable time. As a result of this delay, the wooden hull of the F/V STACY MARIE has deteriorated substantially from the date of loss to the present.

19. The vessel is a total and constructive loss. Defendant and Counter-Plaintiff, Anh Thi Kieu, is entitled to recover the amount of $75,000.00, plus interest from the date of loss from Plaintiff, Counter-Defendant, Albany Insurance Company.

20. The "sue and labor" clause expenditures incurred by the owner/insured Anh Thi Kieu from November 7, 1988 through the day of trial are $15,405.00, for which Anh Thi Kieu is entitled to recover from Plaintiff, Albany Insurance Company, in addition to the $75,000.00 actual damages to the vessel.

21. Intervenor, Sabine Offshore Service, Inc., is entitled to recover the sum of $15,405.00 from Anh Thi Kieu.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and subject matter jurisdiction pursuant to 28 U.S.C. 1333. Venue is proper in this district.

2. On November 3, 1988 Plaintiff, Albany Insurance Co.'s Policy No. 8H-15741 was in full force and effect providing coverage to Defendant, Anh Thi Kieu.

3. The November 3, 1988 allision between the F/V STACY MARIE and a United States Department of Energy stand-pipe is a covered peril of the policy of insurance in question.

4. The owner on board warranty of the Albany Insurance Company Policy No. 8H-15741 was not negotiated by the parties prior to, during or after the policy was delivered. This provision should not be given great deference when determining whether or not to deny

coverage pursuant to a non-negotiated provision. The court must review the policy in light of the setting of the parties and their reasonable expectations as to risks and protection against those risks. *Walter v. Marine Office of America*, 537 F.2d 89 (5th Cir. 1976).

5. Although the owner was not aboard the STACY MARIE at the time of the casualty, breach of the "owner aboard" clause of the policy does not void the policy but only exonerates the underwriter for loss or damage proximately caused by the breach. *See, Lemar Towing Co., Inc. v. Fireman's Fund Ins. Co.*, 352 F.Supp. 652 (E.D. La. 1972), aff'd 471 F.2d 609 (5th Cir. 1973).

6. The fact that the vessel owner, Anh Thi Kieu, was not aboard at the time of the casualty did not contribute to the cause of the allision.

7. State law applies to marine insurance contracts, policies, or applications when it is not in conflict with a federal statute or jurisprudential rubic. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 386, 99 L.Ed. 377 (1955). Texas state law will govern any claim for breach of warranty or misrepresentations of the insured.

8. The Texas antitechnicality statute states that "[n]o breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property." Tex.Ins.C., art. 6.14 (Vernon's 1990). The policy of insurance issued by Plaintiff was not voided by the owner's absence from the vessel November 3, 1988.

9. The presence of the "sue and labor" clause in Plaintiff's policy of insurance required Plaintiff to promptly announce its position in terms of extending or denying coverage to the Defendant after the insurer had notice of a claim or loss. *Reliance Ins. Co. v. The ESCAPADE,* 280 F.2d 482 (5th Cir. 1960).

10. The purpose of the "sue and labor" clause of the STACY MARIE hull policy (line 61 through 67 of the policy) is to cover those expenditures which are made primarily for the benefit of the insurer to reduce or eliminate a covered loss. *Blasser Bros. v. Northern Pan-American Line,* 628 F.2d 376 (5th Cir. 1980). "Sue and labor" expenses are sums expended in an effort to mitigate the damages or loss. *Id.*

11. An insured has a duty under the "sue and labor" clause to save and preserve the vessel. "Sue and labor" clause expenses are added coverage for expenditures incurred by the insured in saving and preserving the vessel from further harm. The clause undertakes to reimburse the assured for the expenditures which are made primarily for the benefit of the underwriter, either to reduce or eliminate further loss to the vessel. *Reliance Ins. Co. v. The ESCAPADE,* 280 F.2d 482 (5th Cir. 1960). The insured, Anh Thi Kieu, took all measures under her control to carry out her duty to save and preserve the STACY MARIE. Albany Insurance Co. acquiesced in the assured's act to save and preserve the vessel and such expenditures are recoverable by the insured. *Reliance Ins. Co. v. The ESCAPADE,* 280 F.2d 482 (5th Cir. 1960).

12. The services contract between Sabine Offshore Service, Inc., Intervenor, and the insured, Anh Thi Kieu, for the travel lift and storage charges beginning on November 7, 1988 are reasonable and reflect necessary

expenditures incurred by the insured under the "sue and labor" clause in an attempt to save and preserve the F/V STACY MARIE subsequent to the November 3, 1988 allision. Intervenor, Sabine Offshore Service, Inc., is entitled to recover from Anh Thi Kieu the full amount of the services rendered to Anh Thi Kieu and the F/V STACY MARIE pursuant to the Sabine Offshore Service, Inc. contract with the insured.

13. All taxable court costs are to be paid by Albany Insurance Company.

14. Any finding of fact which should be deemed a conclusion of law is hereby adopted as such.

DATED: illegible, 1990.

/s/ Illegible

United States District Judge

APPENDIX F

ORAL REASONS FOR JUDGMENT DICTATED BY DISTRICT JUDGE

That's all I have, and I appreciate the Court's time.

THE COURT: Mr. Barry, do you have any response?

MR. BARRY: No, your Honor.

THE COURT: After listening to the testimony in the case and the arguments of the attorneys, we're convinced that this case should have been settled. Perhaps the parties can still settle it. I'm not sure. The Court will try to analyze the testimony as best we can and to be fair to all parties in the decision that we make.

To begin with, it appears to me that the boat owner, Anh Thi Kieu, has been somewhat taken advantage of and has suffered a great deal as a result of her experience as boat owner of the STACY MARIE. Certainly the insurance company had an adequate basis for refusing to write the insurance policy or to cancel the policy after it was written, but the fact remains that they did not do this. They chose to write the insurance policy, and it became effective. Nothing was done or said in regard to canceling the policy or any action on the part of the insurance company that indicated that they were unhappy with having written the policy until after the accident occurred. And in their investigation, they concluded that the accident was not a bona fide accident and that they had been taken advantage of and misrepresentations had been made. Perhaps there are technicalities that were not complied with, but the policy was in effect and in force.

So, it comes down to the question of damages. The Court does not believe that the insurance company has violated its common law duty of good faith and fair dealings. We do not feel that it rises to that status or that quotient, but we do not feel that this affects the fact that the owner is entitled to the damages that she's suffered, because we feel that the insurance company was not without some fault in the case. Counsel speaks of the insurance company acting promptly, but it was some six months before the declaratory judgment suit was filed. The Court feels that under the circumstances and considering the owner, Mr. Kieu,[sic] that they were not being exactly fair with her and they were being super technical.

Now, we get to the question of the valuation and the damages that the owner has sustained; and we feel that she has actually sustained damages in the amount of $75,000. We arrive at this figure by approaching it from several directions and from analyzing the testimony in that Mr. Williams, the surveyor for the insurance company, estimated the value of the vessel at the time before the accident at $90,000 and as having a replacement value of a $108,000. Also, on the questioning of the Court, he estimated that the salvage value is $20,000.

There is always a discrepancy in the amount of value in these admiralty cases and in these insurance claims involving admiralty. It's just amazing how much difference the testimony varies, but it does. Captain Underhill, on the other hand, estimates that the damage that Mrs. Kieu has sustained was in the amount of $90,000, and he obtained some bids for something less than that; but he also feels that the loss was a total loss and that the salvage was about $15,000. So, if you consider the value of the vessel as a total loss of $90,000, with a salvage of $15,000, it would give you $75,000, remaining.

On the other hand, if you consider it from the standpoint of damages to place it back in the condition that it was in before the accident, you still get the fair amount - in the Court's opinion - of at least $75,000. So, the Court will render a judgment for the owner, Mrs. Anh Thi Kieu, the defendant and cross-plaintiff the judgment of damages in the amount of $75,000.

We will deny the Plaintiff's cause of action for declaratory judgment. The plaintiff, of course, would be entitled to interest accruing from the date of the accident up to the present time.

Now, the Court is a little bit disappointed in the contentions of Sabine Offshore Service, Incorporated, as it appears to be a situation where you have a confrontation between dogs and one is injured and the others jump on him. That may not be an accurate analogy, but it doesn't do Sabine Offshore Service, Incorporated, any credit in their contentions as to the amount of money and as to the disposition of the vessel that is to be made. The Court would hope that while their recovery is against the owners of the vessel that they would be reasonable in their demands and reduce the actual storage fees, which the Court feels are excessive, by at least 50 percent. We will ask that counsel for the cross-plaintiff, Mrs. Kieu, prepare a proposed form of judgment and in this judgment make sufficient findings of facts and conclusions of law to justify the Court's decision or that you make the proposed findings and conclusions in a separate instrument along with the form of judgment in the event that an appeal is taken. The Court feels that the parties should be realistic and look at this matter and see if you can't resolve it amicably with a settlement.

Are there any questions?

MR. BARRY: No, your Honor.

MR. SANDERSON: No, your Honor.

THE COURT: We stand adjourned.

(WHEREUPON, THE PROCEEDINGS
WERE CONCLUDED.)

Supreme Court, U.S.
FILED
AUG 14 1991
OFFICE OF THE CLERK

(2)

No. 90-1985

In The

Supreme Court of the United States

October Term, 1991

ALBANY INSURANCE COMPANY,

Petitioner,

vs.

ANH THI KIEU,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Did the Fifth Circuit correctly hold that state substantive law applies to decide whether misrepresentations in an application for marine insurance void the insurance policy?

II

Did the Fifth Circuit construe the meaning of Article 21.16 of the Texas Insurance Code in accordance with the Texas Supreme Court's analysis of the statute?

LIST OF PARTIES

The following are parties to this proceeding:

Albany Insurance Company
Plaintiff-Petitioner

Anh Thi Kieu
Defendant-Respondent

Sabine Offshore Service, Inc.
Intervenor-Respondent

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STATEMENT OF JURISDICTION

Respondent contends that no issues of importance are raised by Petitioner which necessitate this court's review. Further, the Fifth Circuit's opinion in this case does not conflict with any other Court of Appeals decision. The Fifth Circuit's construction of the state statutory law in this case does not conflict with the construction of such law by the Texas Supreme Court. Therefore, Respondent asserts that under Rule 10 of the Rules of the Supreme Court, this Court should not consider Petitioner's Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

In accordance with Rule 15 of the Rules of the Supreme Court, Respondent desires to expand upon the statement of the case as presented by the Petitioner.

Anh Thi Kieu, Respondent, is a Vietnamese immigrant who writes and speaks no English. She relied on Albany Insurance Company's agent, The Edgar Coco Agency, to assist her in filling out the application for insurance. There was no evidence at trial that she either knowingly or intentionally misrepresented any fact to the insurer. Michelle Vu, the Vietnamese translator who assisted Mrs. Kieu in filling out the application, stated that Mrs. Kieu appeared confused after the application was read to her. No evidence whatsoever was adduced at trial that Mrs. Kieu attempted to perpetrate a fraud in this case.

The trial court made a specific finding that no material misrepresentations were made by the vessel owner on the application for insurance. A surveyor for Albany Insurance Company surveyed the vessel shortly after the inception date of the policy and had full opportunity to observe the vessel and to inquire about any representations made on the application that Albany considered material.

Further, Anh Thi Kieu, the insured, is a resident of Texas. The vessel's home port is Port Arthur, Texas, and the insurance policy was brokered in Texas. The insurance application was filled out in the broker's offices in Port Authur, Texas. The accident causing the loss occurred in Texas waters off the coast of Port Arthur, Texas.

ARGUMENT

I.

Petitioner asserts that the Circuit Court erred in refusing to follow the doctrine of uberrimae fidei, which requires that the insured's misrepresentations in an application for insurance, even though innocent, void the insurance contract ab initio. Petitioner urges this Court to determine that the uberrimae fidei doctrine is entrenched federal precedent which must be applied in this case. If a well settled admiralty rule exists, then it must be applied in the construction of a maritime insurance contract. Federal admiralty law preempts inconsistent state law in such an instance. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). If state and federal rules do not differ significantly, then the *Wilburn Boat* test does not come into play. In this case the preemption question need

not be addressed, or as other writers have aptly stated, "the Wilburn Boat need not be boarded"[1] because Texas state law is substantially similar to federal maritime law on this issue.

TEXAS AND GENERAL MARITIME LAW ON MISREPRESENTATIONS ARE SIMILAR

Under Texas state law a misrepresentation made with intent to deceive may void an insurance policy if the misrepresentation is material to the risk or contributes to the cause of the loss. *Robinson v. Reliable Insurance Co.*, 569 S.W.2d 28 (Tex. 1978). Under general maritime law any misrepresentation which is material to the risk can void an insurance policy, regardless of the insured's intent. *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987). The federal rule is more stringent in that intent to deceive is not required, but at least where the undisclosed risk is not material but contributes to the loss, Texas state law may void a policy where general maritime law would not. Nevertheless, both rules prevent an insured from collecting benefits if the misrepresentation is "material." *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 at 887 (5th Cir. 1991). Since the fundamental nature of both rules is the same, and state law in this case is not *inconsistent* with the general maritime law, this court need not rule on whether the uberrimae fidei doctrine usurps Texas state law.

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[1] Several cases have discussed whether a preemption analysis applies in nautical terms. See *Continental Oil Co. v. Bonanza Corp.*, 677 F.2d at 461 (5th Cir. 1982), vacated on rehearing on other grounds, 706 F.2d 1365 (5th Cir. 1983). *Albany Insurance Co. v. Wisniewski*, 579 F.Supp. (D.R.I. 1984).

MRS. KIEU'S VERDICT SHOULD BE UPHELD UNDER EITHER ANALYSIS

The Fifth Circuit's opinion turns on the fact that Mrs. Kieu's misrepresentations were made innocently, with no intent to deceive. Since in Texas an insurance company must prove the insured's intent to deceive to void a policy based on misrepresentation, the Fifth Circuit upheld the lower court's opinion. *Id.* at 892. Further, the trial court, as the sole finder of fact, found that the misrepresentations made by Mrs. Kieu were not material to the risk. Although Petitioner argued on appeal that this finding was clearly erroneous, the Fifth Circuit did not address the issue and thus did not overturn the trial court's finding. *Id.* at 889, n.5. Since the insurance company failed to prove that it relied on misrepresentations "material to the risk," (a necessary element of its case under either state or federal law) an independent ground exists on which to uphold the district court's opinion. Thus, even if the uberrimae fidei doctrine is applicable to these facts, Mrs. Kieu's verdict should be upheld since her misrepresentations were not material and were not relied on by the insurer. See *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 at 872 (2d Cir. 1985). (Even uncontradicted testimony on behalf of the insurance company that a risk is material need not be accepted by the trial court.)

UBERRIMAE FIDEI IS NOT ENTRENCHED FEDERAL PRECEDENT

The Fifth Circuit was correct in its analysis that the uberrimae fidei doctrine is not entrenched federal precedent which must be applied to all maritime insurance

disputes. Although the uberrimae fidei doctrine is recognized as part of the body of general maritime law, it has not been uniformly applied in recent years. *Anh Thi Kieu*, 927 F.2d, 888-890. In many cases where the doctrine has been applied, it has often been consistent with state substantive law; therefore, few cases have considered whether federal maritime law preempts state substantive law in this area. See *Albany Insurance Co. v. Wisniewski*, 579 F.Supp. 1004, 1014 (D.R.I. 1984). For example, most of the district and circuit court opinions discussing the uberrimae fidei doctrine have come from courts within the Second Circuit Court of Appeals. Since both New York state substantive law and federal maritime law embrace the uberrimae fidei doctrine, those opinions did not apply a *Wilburn Boat* preemption analysis. See *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2nd Cir. 1986); *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 (2nd Cir. 1985); *Golden Eagle Liberia v. St. Paul Fire & Marine*, 685 F. Supp. 393 (S.D.N.Y. 1988); *Thebes Shipping, Inc. v. Assicurazioni Ausonia Spa*, 599 F.Supp. 405 (S.D.N.Y. 1984); *Constractor's Realty v. Insurance Co. of North America*, 469 F.Supp. 1287 (S.D.N.Y. 1979); *Anne Quinn Corp. v. American Manufacturers Mut. Ins. Co.*, 369 F.Supp. 1312 (S.D.N.Y. 1973). The Ninth Circuit recognized uberrimae fidei in one 1962 case only because the parties contractually stipulated to its applicability pursuant to British law. *Pacific Queen Fisheries v. Symes*, 307 F.2d 700, 706-709 (9th Cir. 1962). No recent Ninth Circuit case addresses this issue. Only two district court cases within the Ninth Circuit have discussed the issue. The *Wilburn Boat* analysis was not discussed in *Reliance Insurance Co. v. McGrath*, 671 F.Supp.

669 (N.D. Cal. 1987) since California state law still recognizes the uberrimae fidei doctrine in accordance with federal maritime law. Only one lower court case within the Ninth Circuit actually applied a preemption analysis and concluded that uberrimae fidei is entrenched federal precedent. See *Port Lynch Inc. v. New England Int'l Assurety of America, Inc.*, 754 F.Supp. 816, 822 (W.D. Wash. 1991). The Eleventh Circuit Court of Appeals has allowed parties to contract around the uberrimae fidei rule, despite its holdings in *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984) and *Kilpatrick Marine Piling v. Fireman's Fund Ins.*, 795 F.2d 940, 942 (11th Cir. 1986), indicating that it is no longer entrenched federal precedent in that circuit. *King v. Allstate Ins. Co.*, 906 F.2d 1537 (11th Cir. 1990). The Fifth Circuit has recognized but never applied the doctrine. *Anh Thi Kieu*, 927 F.2d at 889. As shown above, it has most often been applied where it was recognized by the state whose law controlled construction of the disputed insurance contract. Thus, while the uberrimae fidei rule is still part of the body of general maritime law, it is not so entrenched that it must be applied to the exclusion of state substantive law.[2] In fact,

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[2] Justice Johnson acknowledged that the uberrimae fidei doctrine is still viable in some cases: "But before we leave our discussion of the tug of war between federal and state law, we find it necessary to stress those decisions which we do *not* reach. This Court does not hold that federal maritime law no longer embraces the uberrimae fidei doctrine: while we have found no cases in this Circuit which apply the doctrine, we also have found no cases which expressly reject the doctrine. Neither does this Court hold that state insurance law always

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the uberrimae fidei doctrine has been abandoned in all areas of insurance *except* marine insurance as rigid and unfair. Justice Johnson correctly pointed out that the "sole remaining substantial vestige of the doctrine is in maritime insurance law." *Id.* at 888. Therefore, under *Wilburn Boat*, Texas state law should apply in this case, since no entrenched federal maritime rule exists and since the State of Texas has a substantial and legitimate interest in regulating insurance contracts.

NO NEED FOR UNIFORMITY AS TO UBERRIMAE FIDEI

Further, no valid reason exists to support the application of this inflexible rule to promote uniformity in the general maritime law. Although Petitioner urges that uberrimae fidei must be applied here to promote such uniformity, it gives no reason why the need for uniformity requires the application of this rule. Petitioner makes no contention that an admiralty court's rejection of the uberrimae fidei doctrine "would defeat the reasonably settled expectation of maritime actors," *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 318 (5th Cir. 1987), rev'd on other grounds, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), or "impair the characteristic features of general maritime law." *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 at 1492 (11th Cir. 1986). The problem of

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will supersede the uberrimae fidei doctrine. In an appropriate case, it is entirely possible that application of the doctrine would be more appropriate than application of the relevant state insurance regulations." *Anh Thi Kieu*, 927 F.2d 890.

misrepresentations in applications for insurance is not "essentially maritime in character, nor one peculiar to admiralty or maritime jurisdiction," but is one which is common to all contracts of insurance, whether they insure matters "ashore or afloat." *Id.* at 1491. The misrepresentation issue is of equal importance to all insurers, maritime and non-maritime alike. No good reason exist why maritime insurers should be favored with the uberrimae fidei doctrine over insurers of other interests. The original reason for the doctrine in maritime law, explained succinctly by the New York Court of Appeals, is no longer valid today:

> The reasons which brought into being the strict maritime insurance law doctrine as to disclosures go far back into the early days of marine insurance, when sailing ships in far away seas were insured in London by underwriters who could get no information except from the ship owners. *Stecker v. American Home Fire Assur. Co.*, 84 N.E.2d 797 (Ct.App.N.Y. 1949).

In today's world of airplanes, telephones, and telefax machines, the maritime insurer has the same opportunity to obtain and verify facts as do other insurers. In fact, in this case Albany's surveyor actually went to the vessel and observed its condition shortly after the inception of the policy. Albany can hardly argue that it had no opportunity to evaluate the materiality of any risk or verify any statements of its insured. Not surprisingly, although Petitioner devotes over two and a half pages of its brief to the need for uniformity in the general maritime law, it does not give one reason why the uberrimae fidei doctrine should be uniformly applied in maritime cases. Petitioner's argument that this doctrine should be uniformly

applied to promote "orderly conduct and development of the maritime commerce of the nation" (Petitioner's brief, p. 14) is simply unsupported by any logical reasoning.

Nor does this Court's opinion in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) require a reversal of the district court's opinion. In *Kossick* the court held that an employer's oral contract with a seaman for maintenance and cure should be construed in accordance with the general maritime law, rather than with the law of the State of New York where the contract was made. The *Kossick* court reasoned as follows:

> Considering that sailors of any nationality may join a ship in any port, and that it is the clear duty of the ship to put into the first available port if this be necessary to provide prompt and adequate maintenance and cure to a seaman who falls ill during the voyage, (citations omitted) it seems to us that this is such a contract as may well have been made anywhere in the world, and that the validity of it should be judged by one law wherever it was made . . . 365 U.S. at 741.

The Court stressed that maritime law does not always displace state law when significant state and local interests exist. *Id.* It distinguished the *Wilburn Boat* decision because it involved an issue with a less "salty flavor" i.e., an insurance contract on a houseboat located in Texas waters. *Id.* The facts at bar are like those in *Wilburn Boat* rather than like those in *Kossick*.

The Eleventh Circuit analyzed why the *Wilburn Boat* rule is still viable, despite the lack of uniformity it causes in admiralty law:

> *Wilburn Boat* has been sharply critized as inconsistent with the concept of admiralty as a body of uniform national law. See, e.g., *G. Gilmore & C. Black, The Law of Admiralty* 49 (2d ed. 1975). True, *Wilburn Boat* is anti-uniformity. It is an advised choice by the Supreme Court in favor of state regulation of insurance, including maritime policies, so long as no overriding admiralty rule exists or is formulated. 348 U.S. at 316-19, 75 S.Ct. at 371-73. The decision points to the long tradition of state regulation of insurance and refers to the complexities and difficulties of attempts to unify insurance law on a nationwide basis, id. at 319, 75 S.Ct. at 373, and of Congress's reluctance to interfere even as to maritime insurance. Id. at 321, 75 S.Ct. at 374. *Steelmet*, 779 F.2d at 1490.

Since there is no entrenched federal precedent and no need for uniformity in this area of the law, Respondent urges that the Fifth Circuit's application of Texas law is correct in the case at bar.

II

ARTICLE 21.16 WAS CORRECTLY INTERPRETED

Petitioner asserts that the Fifth Circuit incorrectly interpreted Article 21.16 of the Texas Insurance Code. It argues that the Court effectively substituted the word "and" for the word "or" in the sentence below after "material to the risk:"

> Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense

> to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk *or* actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case. (Emphasis added). Tex. Ins. Code Ann. Art. 21.16 (Vernon 1981).

According to Petitioner, the Fifth Circuit is "requiring an insurer to prove misrepresentation of facts material to the risk *and* misrepresentation of facts which actually contribute to the casualty." (Petitioner's brief, p. 12). Petitioner bases its argument on the following sentence from the Fifth Circuit's opinion:

> Under Texas law, an insured's misrepresentations may invalidate the policy of insurance, but only if the misrepresentations contributed to the destruction of the insured property. Tex.Ins.Code Ann.Art. 21.16 (Vernon 1981.) *Anh Thi Kieu*, 927 F.2d at 887.

If anything, the above sentence may imply that only one prong of the "either, or" test is inquired of in Texas; it certainly does not imply that both prongs of the test must be satisfied by the insurer. Nevertheless, this sentence constitutes dicta, is not a direct holding, and is in and of itself a correct statement of Texas law.

The Fifth Circuit has previously construed the meaning of Article 21.16 consistently with the Texas Supreme Court's analysis in *Robinson v. Reliable Ins. Co.*, 569 S.W. 2d 28. In *Bettes v. Stonewall Ins. Co.*, 480 F.2d 92 at 95 (5th Cir. 1973) the Court stated that the test is disjunctive rather than conjunctive. The above sentence, plucked out

of context by Petitioner, does not indicate a departure from the Court's analysis in *Bettes* when it is read with the remainder of the opinion. Therefore, Petitioner's argument that a correction by this court of the Fifth Circuit's reading of Article 21.16 would necessitate that Petitioner's arguments on materiality to be decided below is without merit.

CONCLUSION

The Fifth Circuit correctly applied Texas state law to the marine insurance contract in this case. The uberrimae fidei doctrine does not constitute entrenched federal precedent. No reason exists why the doctrine should be uniformly applied to marine insurance contracts.

Further, the Fifth Circuit correctly interpreted Article 21.16 of the Texas Insurance Code.

Therefore, Respondent respectfully requests that Petitioner's Writ of Certiorari be denied.

Respectfully submitted,

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—v.—

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MOTION AND BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AND MOTION FOR LEAVE TO INTERVENE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Institute of Marine Underwriters (AIMU) hereby requests permission to file a brief *amicus curiae* in this matter. Consent of all parties has been duly requested. Petitioner and Intervenor-Respondent have consented to the filing of the attached brief. No response from Respondent has been received to requests for consent sent by mail and by telefax.

AIMU was founded in 1898 and is a national trade association of over ninety insurance companies, each of which is authorized to engage in the business of marine insurance in one or more states of the United States. Because its member-

ship underwrites approximately ninety percent of the marine insurance written in the United States, the issues of this case are of extreme importance to AIMU and its member companies in their efforts to maintain uniformity in and consistent application of the laws affecting maritime commerce and marine insurance. An issue of very special significance to AIMU and its member companies is presented in this case. The decision of the Court of Appeals for the Fifth Circuit held that the doctrine of *uberrimae fidei* is not entrenched federal precedent.

AIMU's interest in this appeal stems from its desire for uniformity and certainty in maritime law throughout the United States. The Fifth Circuit's decision that the doctrine of *uberrimae fidei* is not established federal maritime law strikes at the heart of the marine insurance business in this country, and the world, and the manner in which it is conducted. The decision of the Court of Appeals in this matter is contrary to the great weight of authority and will seriously affect the American marine insurance market.

The decision of the Appellate Court would destroy a practice and procedure centuries old with which all parties in marine insurance are familiar and to which they have adapted. The detailed case law developed over centuries, which has served as a guide to the parties, will be rendered void. In its place will come confusion, uncertainty, and extensive litigation.

The matter under review by the Court involved a misrepresentation in the procurement of a marine policy on a fishing vessel. A crisis in the availability and affordability of fishing vessel insurance was widely investigated by Congress in the 1960's and again in the mid-1980's. AIMU worked closely with the House Merchant Marine and Fisheries Committee, the Senate Merchant Marine Subcommittee, the National Marine Fisheries Service, the National Council on Fishing Vessel Safety and Insurance and the Marine Index Bureau in studying this problem and seeking solutions. The decision rendered in this case could have serious consequences with

respect to fishing vessel insurance and marine insurance in general.

A study of loss statistics on fishing vessel insurance among American marine underwriters in the early 1980's showed that, on average, losses and expenses were 166% of income for the Gulf Region and 156% nationwide. *See Insurance of Fishing Vessels: Hearings on H.R. 4407, H.R. 4415, H.R. 4465, H.R. 277 and H.R. 3156 Before the Subcomm. on Merchant Marine, the Subcomm. on Coast Guard and Navigation and the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 2d Sess. (1986) (statement of Peter J. Egan, Chairman of the AIMU Fisheries Insurance Committee). Dishonesty was one factor contributing to the staggering losses. The "moral hazard", the possibility that a vessel will be sunk, stolen or burned to claim the insured value, is one of the underlying problems associated with fishing vessel insurance. National Research Council, *Fishing Vessel Safety: Blueprint for a National Program* 138 (1991).

Misrepresentation in the procurement of insurance policies, in general, is a serious problem confronting the insurance industry. The Court's decision flies in the face of public policy of discouraging dishonesty in insurance applications. The decision ignores the unique character of marine insurance contracts and relaxes the standards by which concealment in maritime insurance is judged by doing away with the time-tested duty of utmost good faith. The decision of the Court also conflicts with the overwhelming weight of federal law and denies a primary tenet of marine insurance law adhered to by maritime nations of the world.

In filing this brief *amicus curiae*, AIMU is acting in support of the American and international marine insurance communities. Uniformity of admiralty law is the area of vital concern to AIMU. Because of the expertise developed by petitioner on issues relating to marine insurance, it would be

of assistance to the Court to hear its views on the problems presented in this case.

AIMU respectfully prays that this Honorable Court accept its brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Summary of Argument

The doctrine of *uberrimae fidei* is an established federal admiralty rule in marine insurance law, having been applied in the United States since the birth of the nation. When an established federal rule exists concerning marine insurance contracts, that rule must be applied. The Court of Appeals erred in holding that Texas law and the federal rule are similar. An analysis of that Court's opinion demonstrates that the Texas rule or rules regarding misrepresentation differ materially from the federal rule. The Petition for Writ of Certiorari should be granted.

ARGUMENT

I

THE DOCTRINE OF *UBERRIMAE FIDEI* IN MARINE INSURANCE IS THE BASIS UPON WHICH ALL MARINE INSURANCE CONTRACTS ARE MADE

The doctrine of *uberrimae fidei* is the premise upon which all marine insurance contracts are based. The marine underwriter, in deciding to accept a risk, the premium to be charged, and the terms and conditions of coverage, relies upon this rule of law known to all maritime brokers and underwriters. The assured and the broker must advise the underwriter of all facts in their knowledge material to the risk to be insured. Given the perilous and far flung environments in which the subjects of marine insurance function, the varieties of cargoes and ships with their particular, and sometimes unique attributes and characteristics, it is difficult to imagine underwriters functioning without the doctrine of *uberrimae fidei*. The terms, conditions of coverage, and premiums to be charged are established by underwriters based upon the information presented to them concerning a product or vessel and the particular characteristics of the trade involved. Without the rule of *uberrimae fidei*, or complete disclosure, the practice in the field of marine underwriting would change drastically. Marine underwriters would have no recourse but to set stringent terms and conditions in their policies and increase premiums in an attempt to place themselves on some sort of equal footing in dealing with insureds with respect to knowledge of the relevant facts regarding a risk.

II

THE DOCTRINE OF *UBERRIMAE FIDEI* IS AN ESTABLISHED FEDERAL ADMIRALTY RULE IN MARINE INSURANCE LAW

In *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), the United States Supreme Court held that in

determining what law was applicable in deciding cases involving marine insurance contracts, the first step was to determine whether there was a judicially established federal admiralty rule governing the issues involved. If an established federal rule existed, it was to be applied.

In *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), the Court further elaborated on this point, stating at 742:

> Nor is *Wilburn Boat Co. v. Fireman's Ins. Co.*, 348 U.S. 310, apposite. The application of state law in that case was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented.

The doctrine of *uberrimae fidei*, as applied to marine insurance, is hundreds of years old and applied in both the United States and England.

In the United States, a few of the authorities applying the rule are *McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (1828); *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485 (1882); two Fifth Circuit decisions, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) and *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969); and Appellate and District Courts' decisions from many other Circuits, i.e., *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 (2d Cir. 1985); *Albany Ins. Co. v. Wisniewski*, 579 F. Supp. 1004 (D.R.I. 1984); *Hartford Ins. Co. v. Garvey*, 1989 A.M.C.[1] 652 (N.D. Cal. 1988); *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689 (11th Cir. 1984), have expressly stated that the *uberrimae fidei* federal maritime rule was the basis upon which the cases were decided. The decisions above cover a span of over 160 years.

It is submitted that a doctrine applied for more than 160 years by our courts is an established federal admiralty rule. The decision in *McLanahan*, *supra*, with its citation to prior

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1 American Maritime Cases not officially reported.

authorities, makes it evident that the *uberrimae fidei* doctrine is one as old as the country itself.

III

THE PANEL'S DECISION IS ERRONEOUS IN HOLDING THAT TEXAS LAW AND THE FEDERAL RULE ARE BASICALLY SIMILAR

The Court of Appeals discussed the factors which should be examined in determining whether to apply federal maritime law or state law. Opinion, pp. 3162-64.[2] One of the factors to be considered is any material difference between state law and federal law on the subject.

> State insurance law generally should not govern marine insurance disputes if it is materially different from federal maritime law. (Opinion, p. 3163).

The Court then set out two inconsistent versions of the Texas rule.

At page 3163, it stated:

> Under Texas law, an assured's misrepresentations may invalidate the policy of insurance, ***but only if the misrepresentations contributed to the destruction of the insured property***. Tex. Ins. Code Ann. art. 21.16[3] (Vernon 1981). Texas law, unlike federal law, imposes an appropriate limitation that relatively minor misstatements which have no causal connection with the destruction of the property do not afford an excuse for

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2 The relevancy and basis for the factors listed is questionable. The Supreme Court in *Wilburn* simply stated that if an established federal rule exists, it was to be applied. No additional factors were discussed.

3 It is highly questionable that this is an accurate expression of Texas law. The Court in *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 644 (5th Cir. 1962), discussed the identical section, quoted the exact section, and reached an opposite conclusion. A reading of section 21.6 shows that as regards a misrepresentation, materiality, not causality, is the determining factor.

> non-payment. The fundamental nature of both laws, however, is the same.

(emphasis added).

Five pages later in its Opinion, the Court sets out a Texas rule with respect to misrepresentations based upon materiality as opposed to causality and adds to the insurer's burden a *scienter* requirement, tantamount to proof of civil fraud.

> Under Texas insurance law, an insurer may invalidate a policy of insurance on the basis of the insured's misrepresentations in the insurance application only if the insurer can successfully plead and prove the following five elements: (1) the making of the representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; (4) ***the intent to deceive on the part of the insured in making same***; and (5) the materiality of the representation. The unique aspect of this Texas law is the requirement that the insurer plead and prove the insured's intent to deceive.

Opinion, p. 3168. (emphasis added; citations omitted).

In *Gulfstream Cargo*, *supra*, at 981 n.20, the maritime rule is stated:

> In marine insurance, contrary to the general rule applicable to other kinds of insurance discussed . . . any omission to communicate a material fact which insured is under an obligation to disclose will vitiate the policy whether such omission is intentional or results from mistake, accident, forgetfulness, or inadvertence; and fraud is not necessary. . . . All facts are material which would affect the mind of a rational underwriter, governing himself by the principles on which underwriters in practice act, as to either of the following points: 1st, whether he will take the risk at all; 2nd, at what premium will he take it. The duty attaches at the time of effecting the insurance, * * * for the effect of a concealment in avoiding the policy is to be determined not by its eventual relation to the nature of the risk, but

> with reference to its immediate influence on the judgment of the underwriter.

(citations omitted)

It is submitted that a simple reading of the two rules demonstrates that either or both "versions" of the Texas law recited by the Fifth Circuit differ materially from the federal law on concealment in marine insurance contracts. No expression of the federal law requires a marine underwriter to prove causality or *scienter* with respect to non-disclosure of material facts.

Hence, the Fifth Circuit's decision is contrary to one of the factors it listed.

The Circuit Court additionally erred at page 3165 when it stated, in reference to *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631 (5th Cir. 1962) and *Gulfstream Cargo, supra*:

> Each of these cases has declined, however, to enforce the strict *uberrimae fidei* rule as the basis for the invalidation of a marine insurance policy.

This statement is not accurate. As stated in *Gulfstream Cargo, supra*, at 981:

> With much ground for echoing the Court's [*Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)] conclusion there expressed, that the maritime law, not the state law, would control on the issue of concealment, see 300 F.2d at 647 n. 12, we again find it **unnecessary** to resolve the point further. Of Florida we can say what we there said of Texas. 'Although we have found no Texas case expressly applying this rule, **there is no indication that the Texas courts have departed from this firmly established principle of marine insurance.**' 300 F.2d at 647.

(emphasis added)

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted in this matter.

The doctrine of *uberrimae fidei* is a time honored, firmly established component of federal maritime law.

The Circuit Court's decision, if allowed to stand, will cause substantial disruption in the marine insurance business which will be to the detriment of both insureds and insurers. The result will be the destruction of the basis under which the industry has functioned for hundreds of years. As the insurers and their customers seek to develop new concepts to address the problems created by this decision, there will, of necessity, be increased confusion and misunderstanding, resulting in needless litigation as the parties seek to reestablish some workable framework in which to proceed.

Respectfully submitted,

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Versus

ANH THI KIEU,
Respondent

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF CONSENT OF ALL PARTIES

The Maritime Law Association of the United States certifies that all counsel-of-record have stated in writing that they consent to The Maritime Law Association of the United States' submission of a Brief *Amicus Curiae* in support of Albany Insurance Company's Petition for Writ of Certiorari. Copies of the written consents have been filed with the Clerk.

STATEMENT OF INTEREST

The Maritime Law Association of the United States has a very strong interest in the disposition of this case. The MLA is a nationwide bar association founded in 1899. It has a membership of about 3,600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

The MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters, and other maritime claimants and defendants.

The purposes of the MLA are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation,* to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations. (Emphasis added.)

In furtherance of these objectives, the MLA, during the ninety-one years of its existence, has sponsored a wide range of legislation dealing with maritime matters

including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

The MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commission on Trade Law ("UNICITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

The MLA has actively participated as one of some forty-nine national maritime law associations constituting the Comite Maritime International,[4] in the movement to

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1. 46 U.S.C. §§ 1300-1315.

2. 9 U.S.C. §§ 1-15.

3. E.G., 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; Implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 M.M. *COHEN*, BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3.35 to 3-78.2 (7th rev'd ed. 1990) (hereinafter "BENEDICT"), *see* 33 C.F.R. ch. 1, subch. D., Special Note at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

4. These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

The MLA believes that uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975, the MLA Standing Committee on Uniformity of United States Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975. A substantially identical resolution was adopted by the American Bar Association in 1976.[6] This policy has since been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

In furtherance of its uniformity policy and resolutions, the MLA has filed *amicus* briefs in a number of cases

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5. E.G., Assistance and Salvage 1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. ..o. 1-1 at 1-2 to 1-19; Collision (1910); *reprinted in* 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), *reprinted in* 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3 at 6-62.103 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4 at 5-32.1 to 5-44.3.

6. MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7. MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

before the United States Supreme Court[8] and the Circuit Courts of Appeal. For example, *Alyeska Pipeline Service Co. v. Vessel BAY RIDGE*, 703 F.2d 381, 383 n. (9th Cir. 1983), *cert. dismissed*, 467 U.S. 1247 (1984), the Court noted that:

> The Maritime Law Association of the United States submitted a brief *amicus curiae* in support of Alyeska. We recognize the expertise of *amicus* and appreciate their participation.

It is the policy of the MLA to file briefs as *amicus curiae* only when, as in this matter, important issues of maritime law are involved and the court's decision may substantially affect the uniformity of maritime law.

SUMMARY OF ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED:

1. To promote uniformity in the admiralty law at both a national and international level in the interpretation of marine insurance contracts;
2. To resolve conflict among the circuit courts with respect to the application of the doctrine of *uberrimae fidei* as a principle of marine insurance;
3. To discourage potential fraud and deceptive conduct.

The Maritime Law Association stands for the proposition that the maritime law should be uniform throughout the various states of the United States and insofar as

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8. Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986); Ray v. Atlantic Richfield Co., 435 U.S. 1151 (1978); *Askew v. American* Waterways Operators, Inc., 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

practical this uniformity should be carried to an international level. Our Constitution provides the bedrock for this uniformity by extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction (Article III, Section 2 of the United States Constitution). The commercial field of marine insurance is strongly influence by the commercial insurance market of Great Britain, where much of the coverage is either written or reinsured. It is neither practical nor wise to ignore the English rule of utmost good faith which has long been a part of their law, as well as being a part of the maritime law of the United States since the inception of the Country.

A direct conflict exists among the circuits between the opinions of the Fifth Circuit in this case and the following cases: *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 647 n. 12 (5th Cir. 1962), *cert. denied*, 370 U.S. 925 (1962); *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 981 n. 20 (5th Cir. 1969); *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984), vacated in part, adhered to in relevant part, 779 F.2d 1485 (11th Cir. 1986); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 (2d Cir. 1985); *Btesh v. Royal Ins. Co.*, 49 F.2d 720 (2d Cir. 1931); *A/S Ivarans Rederei v. Puerto Rico Ports Authority*, 617 F.2d 903 (1st Cir. 1980).

The adoption of the rule espoused by the opinion of the Fifth Circuit in this case adds fuel to the conflagration of fraud and deception practiced upon insurance companies generally and debases the maritime rule established through the centuries. In these times of rising insurance premiums, this is not the direction in which conduct should

be guided. This encourages lying and cheating by some at the expense of the honest insured who conducts his business in a proper manner in reliance upon our courts to enforce the rules against those who do not.

I.

THE REJECTION OF THE DOCTRINE OF *UERRIMAE FIDEI* IN THE FIFTH CIRCUIT IS CONTRARY TO THE UNIFORMITY DOCTRINE

The practical need for uniformity in the law of marine insurance by vessel owners and their underwriters, as well as all facets of the maritime public, is all too apparent because the subject matter of commercial interest floats from state to state, and nation to nation, so that it may touch many jurisdictions in a short span of time. This case is national in scope as the Fifth Circuit had to determine whether it should apply Louisiana law or Texas law. The concept that some aspects of the insurance industry are best regulated on a state-by-state basis does not apply to fundamental concepts such as this regarding the duty of disclosure and the duty of fair dealing between assured and underwriter.

The need for international uniformity in maritime law has also been recognized by this Court. This is particularly true in the field of marine insurance as it is recognized that the commercial markets of England are subject to the English law and have retained to the present time a very important function regarding the insurance and reinsurance of marine risks. This Court, speaking through Justice Holmes, recognized this special relationship as follows:

> Of course, it is desirable, if there is no injustice, that the maritime law of this country and of England should agree. *The Eliza Lines,* 199 U.S. 119, 128 (1905);
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> There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business. *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.,* 263 U.S. 487, 493 (1924)

The law of England has now been expressed in the Marine Insurance Act of 1906 (6 EDW. 7 c. 41), where the doctrine of *uberrimae fidei* has been statutorily codified. The need for national and internation uniformity support the adoption of the doctrine of *uberrimae fidei* as the American rule of marine insurance.

II.

THE CONFLICT BETWEEN THE CIRCUITS CREATED BY THIS FIFTH CIRCUIT OPINION CREATES DISHARMONY WHERE NONE NEED EXIST

The Fifth Circuit opinion is incorrect in stating that the Fifth Circuit has not previously recognized the doctrine of *uberrimae fidei* as an entrenched rule of marine insurance. It was described as being "direct and clear" in *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.,* 409 F.2d 974, 981 n. 20 (5th Cir. 1969); and "solidly entrenched" in *Fireman's Fund Ins. Co. v. Wilburn Boat Co.,* 300 F.2d 631, 647 n. 12 (5th Cir. 1962), *cert. denied,* 370 U.S. 925 (1962). In *Steelmet, Inc. v. Caribe Towing Corp., supra,* the Eleventh Circuit described it as "a clear rule of maritime law" and "the controlling federal rule even in the face of contrary state authority." The Second Circuit has adopted the rule of *uberrimae fidei* in *Knight*

v. U.S. Fire Ins., 804 F.2d 9 (2d Cir. 1986); and *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 (2d Cir. 1985); and *Btesh v. Royal Ins. Co.*, 49 F.2d 720 (2d Cir. 1931).

Some confusion has apparently resulted from this Court's majority opinion in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). This often-critized opinion[9] perhaps needs to be revisited for clarification of the appropriate role of state insurance regulatory schemes with respect to marine insurance. It is respectfully submitted that the state regulatory role should not be in any way promoted to the front-line position of establishing the law relating to the duty of disclosure with respect to a marine insurance policy. Determination of this substantive admiralty rule is the function of this Constitutional Admiralty Court. The principle of *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), that matters having a direct and vital bearing on maritime law,such as the rules of navigation even for pleasure boats, are preserved to this Court under the Constitutional grant of admiralty jurisdiction, is applicable to this doctrine of *uberrimae fidei*. This is not a question of federal preemption, but a matter of basic constitutional federal jurisdiction.

Should the Court not be persuaded that the doctrine of *uberrimae fidei* is a well-settled maritime rule, the need for uniformity in admiralty practice is so great that the Court is well justified in formulating such a rule. *See, Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d 506, 510 (9th Cir. 1984). The doctrine of *uberrimae fidei* and the consequences of breach of that doctrine are matters requiring uniformity.

III.

THE DOCTRINE OF UBERRIMAE FIDEI IS AN IMPORTANT DETERRENT OF POTENTIAL FRAUD AND DECEPTIVE CONDUCT AND SHOULD BE PROMOTED

The deception and fraud authorized by the Fifth Circuit opinion is that claimant lied in the application for insurance and said she paid $110,000.00 for the fishing vessel *STACY MARIE* when, in fact, she paid $30,000.00 for it. This opinion authorizes recovery of the full insured amount of $90,000.00, less $15,000.00 salvage value for the hull, plus sue and labor charges of $15,405.00. This fraud on the underwriters should not be permitted to stand as the law of the admiralty. Rules of honest conduct should be encouraged rather than debased. If this Court is of the view that a rule requiring cancellation of the policy in these circumstances should not be declared to be the general maritime law, this Court should review the matter and adopt the rule it deems appropriate, rather than permit or encourage the search for a preferable rule of state law as undertaken by the Fifth Circuit in this case.

In *Btesh v .Royal Ins. Co., supra,* the court applied the rule of *uberrimae fidei* where the assured misdescribed

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9. Gilmore & Black, *the Law of Admiralty*, 49, 69, 70 (2d Ed. 1975). ("A nightmarish solution." "The implication of *Wilburn* would appear to be that maritime insurance law as a whole is to be excised from the general maritime law inferentially adopted by the Constitution."); Staring, *A Proposal to Reduce Confusion in the Law of Marine Insurance,* 5 Maritime Lawyer 21, 24, 25, 26 ("aggravated confusion"); *Lexington Ins. Co. v. Cooke's Seafood,* 686 F. Supp. 323, 328 (S.D. Ga. 1987); *Travelers Indemnity Co. v. Boles,* 503 F. Supp. 179, 182 n.8 (N.D. La. 1980); *Litwinowicz v. Weyerhaeuser Steamship Co.,* 179 F. Supp. 813, 820 (E.D. Pa. 1958).

cargo as cotton goods instead of silk goods to filch a little from the carrier. It was held that intent to cheat the underwriter was not required.

In *Knight v. U.S. Fire Ins. Co., supra,* the court voided a cargo insurance policy taken out in the amount of $30,000,000.00 on 222 antique stone and bronze statutes purchased in Thailand for $65,000.00 on the ground that the insured failed to disclose that a previous underwriter had cancelled a previous policy because of overvaluation and fraud. The rule of *uberrimae fidei* should be reinvigorated as a vital part of marine insurance law.

CONCLUSION

The Maritime Law Association of the United States joins Petitioner and *Amicus Curiae* in support thereof in urging this Honorable Court to accept this case and grant the Petition for Writ of Certiorari.

Dated, July 29, 1991.

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as *Amicus Curiae*

CERTIFICATE OF SERVICE

To the Honorable Judges of This Court:

I, Ben L. Reynolds, one of the attorneys for The Maritime Law Association of the United States and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of July, 1991, I served all parties in this matter with three copies of the Brief of The Maritime Law Association of the United States, *Amicus Curiae,* in Support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by depositing the documents in a United States mailbox, with first-class postage prepaid, addressed to counsel-of-record at the proper postal address as follows:

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Supreme Court, U.S.
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NO. 90-1985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALBANY INSURANCE COMPANY,
Petitioner

Versus

ANH THI KIEU,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF HIGHLANDS INSURANCE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF CONSENT OF ALL PARTIES

Highlands Insurance Company certifies that all counsel of record have stated in writing that they consent to Highlands' submission of a Brief Amicus Curiae in support of Albany Insurance Company's Petition for Writ of Certiorari. Copies of the written consent have been filed with the Clerk.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF HIGHLANDS INSURANCE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST

Highlands Insurance Company (hereafter Highlands) was incorporated in Texas in 1975, and is licensed to engage in the insurance business in all of the United States. Highlands has been underwriting marine insurance risks for fishing vessels and other craft since 1968, and has written many thousands of hull insurance policies as well as other forms of marine insurance. Vessels in-

sured by Highlands operate along and offshore all three United States coasts, in Alaska, Hawaii, and Puerto Rico. Highlands intends to continue its participation in the business of writing marine insurance policies.

Highlands has received claims and on occasion has participated in claims-related litigation in almost every coastal state. Because it is unable to predict where vessels it insures may have casualties, and therefore where claims and litigation may arise, Highlands depends upon and is vitally interested in the uniform application of marine insurance law throughout the United States so that it may proceed with the tasks of underwriting and claims evaluation in the most rational, consistent and economic fashion.

Prior opinions of this Court, the Fifth, First, Second, and Eleventh Circuit Courts of Appeal, have led Highlands and other members of the insurance industry to underwrite their policies relying on the doctrine of *uberrimae fidei* as a specific and controlling rule of federal marine insurance law which, until now, has been accorded a consistent and uniform application throughout the United States. But the Fifth Circuit's decision below, *Albany Insurance v. Anh Thi Kieu,* 927 F.2d 882 (5th Cir. 1991), brings unheaval and conflict to this settled area of maritime law. This presages turmoil in marine insurance underwriting practices, with resultant and unnecessary difficulties for those attempting to purchase marine insurance.

As a substantial member of the marine insurance industry in the United States, and therefore being directly affected by the opinion of the Fifth Circuit, Highlands submits its Brief *Amicus Curiae* in support of the Pe-

tition for Writ of Certiorari in the hope that it will assist the Court in considering in detail the need to repair the damage to the maritime law and marine insurance interests, insureds as well as insurers, caused by the Fifth Circuit's decision.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be granted:

1) To resolve a conflict among the Circuits and to enunciate unequivocally the continuing vitality of the federal courts' previous declarations of *uberrimae fidei* as a principle of maritime law.

The decision below not only rejects the Fifth Circuit's own previous and long-standing acknowledgement and reliance upon the principle of *uberrimae fidei* in *Fireman's Fund Ins. Co. v. Willburn Boat Co.*, 300 F.2d 631, 647 n. 12 (5th Cir. 1962), *cert. denied*, 370 U.S. 925 (1962), and *Gulfstream Cargo Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 981 n. 20 (5th Cir. 1969), but creates a conflict with the law of the First, Eleventh and the Second Circuits in directly analogous fact situations on this significant principle pertaining to the interpretation of marine insurance contracts. *See, Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984), *vacated in part, adhered to in relevant part*, 779 F.2d 1485 (11th Cir. 1986); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Puritan Ins. Co. v. Eagle S.S. Co., S.A.*, 779 F.2d 866 (2d Cir. 1985); *A/S Ivarans Rederei v. Puerto Rico Ports Authority*, 617 F.2d 903 (1st Cir. 1980).

2) To preserve and further encourage uniformity in the interpretation and application of marine law and prevent cases with identical facts having diametrically opposed outcomes in the various judicial circuits.

Heretofore the *uberrimae fidei* doctrine has been uniformly incorporated in the maritime law of the several circuits. The Fifth Circuit's decision below represents an abandonment of that principle and of the goal of uniformity in the application of maritime law throughout the United States. The decision below relegates the interpretation and application of each marine insurance policy to the vagaries of the law of the state where the marine casualty occurred or the policy written, ensuring completely contradictory outcomes in cases involving the identical or similar issues.

3) To eliminate the encouragement of fraud by marine insureds and the disruptive and deleterious effect on the marine insurance industry which will result from the decision below.

The Fifth Circuit's radical departure from this doctrine precipitates a great discontinuity into the marine insurance law and sets the stage for an upsurge of fraud on the part of marine insureds. The net result will be less efficiency in the marine insurance market, more expensive insurance, and fewer marine insurers. None of these ends works to the advantage of maritime commerce in this nation.

ARGUMENT

I.

THE FIFTH CIRCUIT'S DECISION BELOW CREATES A WHOLLY UNTENABLE CONFLICT WITH THE LAW OF THE FIRST, SECOND AND ELEVENTH CIRCUITS AS TO A CORE PRINCIPLE OF MARITIME LAW AND IN THE RESULTS OF THE APPLICATION OF THAT PRINCIPLE TO SIMILAR FACT SITUATIONS.

The opinion below creates a head-on conflict in maritime law between the Fifth Circuit and the Circuit Courts of Appeal for the First, Second, and Eleventh Circuits, not only as to the preeminence of *uberrimae fidei* as a principle of marine insurance, but in the application of that principle to similar but undistinguishable fact patterns.

In the case at bar, Anh Thi Kieu applied for $90,000 in marine insurance on her shrimp boat, falsely alleging, *inter alia,* that she had purchased the vessel for $110-000, when in fact she had paid only $30,000 for the vessel. Labeling the Fifth Circuit's prior enunciations of the preemptive force of the doctrine of *uberrimae fidei* as "mere dicta," the court below allowed Anh Thi Kieu to recover the $90,000 face value of the policy, less the $15,000 salvage value of the vessel. This resulted in a recovery of 250% of the cost of the vessel actually paid by Anh Thi Keiu. Such inflated recoveries by assureds provide a strong motive for fraud and deception. For this reason, virtually every insurer in all 50 states, if not worldwide, refuses to write insurance for more than the amount the prospective assured paid, at least with-

out being furnished information by the assured which supports the higher value of the vessel being insured.

The Second and Eleventh Circuits, have unequivocally recognized the doctrine of *uberrimae fidei* as an established and clear rule of maritime law:

1. In *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987), the Second Circuit applied the doctrine of *uberrimae fidei* to affirm summary judgment for the defendant insurer, voiding *ab initio* a $30 million marine insurance policy on antique statues which were lost at sea. It did so because the assured failed to disclose the very material fact of a prior underwriter's cancellation of a $30 million policy because it believed the statues were overvalued, and because this fact would have controlled the underwriter's decision not only on whether to accept the risk at all, but as to the amount of coverage it would provide. 804 F.2d at 14. The court emphasized that the issue of whether the prior cancellation was justified and whether the statues were in fact overvalued and inauthentic was not material, only the fact that the prior policy had been cancelled. *Uberrimae fidei* required the assured to disclose this fact so that the new insurer could decide for itself whether to accept the risk and what amount of coverage to offer. The decision of the court below in this case would require the payment of the $30 million to the insured, a handsome reward to the insured for concealing a very material fact which misled and deceived the insurer.

2. In *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984), *vacated in part, adhered to in relevant part*, 779 F.2d 1485 (11th Cir.

1986), the Eleventh Circuit, stating that the maritime rule requiring full disclosure by a prospective insurer is the controlling rule even in the face of contrary state law, held that knowledge of unseaworthiness by the assured, not communicated to the insurer, would void a hull insurance policy. 747 F.2d at 695. The decision of the court below would have permitted the assured to recover in full despite its concealment of the unseaworthiness of its vessels.

3. While not expressly referring to the doctrine of *uberrimae fidei,* the First Circuit voided a marine liability reinsurance policy based on the assured's failure to meet the "high standard of disclosure of material facts applicable in marine insurance dealings," citing *Fireman's Fund Ins. Co. v. Wilburn Boat Co.; A/S Ivarans Rederei v. Puerto Rico Ports Authority,* 617 F.2d 903, 905 (1st Cir. 1980). In *A/S Ivarans Rederei,* the First Circuit denied recovery to the assured where the assured's primary insurer had not disclosed to the reinsurer prior incidents arising from defective dock conditions of which the assured had full knowledge and which had not been remedied. The court held the reinsurance policy void even though the assured port authority *had* disclosed these facts to the insolvent primary insurer. The decision below would permit the dock owner assured to recover, despite its concealment of the defects and its complete failure to correct them.

As the foregoing demonstrates, the late-in-the-day rejection by the Fifth Circuit of *uberrimae fidei* as a preeminent and fundamental rule of maritime law results in diametrically opposed outcomes in the various circuits in directly analogous fact situations. It is abundantly clear that if the case below had arisen in the First,

Second or the Eleventh Circuit, Anh Thi Kieu's blatant and admitted misrepresentations would have resulted in her marine hull policy being voided. At least up to 1969, Anh Thi Kieu would have lost even in the Fifth Circuit itself on these same facts. *See Gulfstream Cargo, supra.* At this time, only in the Fifth Circuit would Anh Thi Kieu's uncontroverted misrepresentations have been *rewarded* by a 250% profit on her investment. This Court should not permit such an unsound policy which allows the rewarding of the devious and deceitful to stand.

This disruption of uniformity among the circuits is made all the more difficult, and the need to quiet this newly-created disharmony in the maritime law of the United States is made all the more compelling, when one recalls that it was largely the Fifth Circuit Court of Appeals that was responsible for national acceptance of the notion that marine insurance contracts must be interpreted in light of the principle that both parties to the contract are held to the standard of utmost good faith and full disclosure. It was its offspring, however, the Eleventh Circuit Court of Appeals which stated it most concisely:

> "The general rule of maritime insurance requiring full disclosure, is well settled in this circuit, and as a clear rule of maritime law it is the controlling federal rule even in the face of contrary state authority."

Steelmet, Inc. v. Caribe Towing Corp., supra at 695. Likewise, the trial courts in circuits where the *uberrimae fidei* question in its present incarnation has not yet been considered by the circuit court of appeals

have generally followed the leadership of the Fifth Circuit in concluding that the *uberrimae fidei* doctrine is entrenched federal maritime law. E.g., *Port Lynch, Inc. v. New England Int'l Assurety of America, Inc.*, 754 F. Supp. 816 (W.D. Wash. 1991).

The Writ of Certiorari should be granted to resolve this untenable conflict.

II.

THE FIFTH CIRCUIT'S DECISION BELOW PRECLUDES AND UNDERMINES THIS COURT'S ENUCIATED GOAL OF UNIFORMITY IN MARITIME LAW.

Uberrimae fidei is a bedrock principle of maritime law, heretofore receiving uniform application nationwide. This Court has repeatedly taught that uniformity in the administration of maritime law by courts of the United States is a vital goal. *Miles v. Apex Marine Corp.*, ____ U.S.____, 111 S. Ct. 317, 323, 112 L.Ed.2d 275 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986). Opinions of the Fifth Circuit in the past have reflected a particular sensitivity to the multi-jurisditional problems inherent in maritime commerce, which cause uniform application of maritime law throughout the United States to be such a salutory goal. *J. Ray McDermott & Co. v. M/V MORNING STAR*, 457 F.2d 815, 818 (5th Cir. 1972) (*en banc*), *cert. denied*, 409 U.S. 948 (1972) (referencing the harmony maritime law brings to international and interstate relations). *See also, Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 317-18 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988) (uniformity doctrine "is of greatest importance where legal relations are not predictably related

to a certain locale and its laws"). The Fifth Circuit has previously described the *uberrimae fidei* doctrine as "direct and clear," *Gulfstream Cargo Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 981 n. 20 (5th Cir. 1969), and "solidly entrenched," *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 647 n. 12 (5th Cir. 1962), *cert. denied*, 370 U.S. 925 (1962). Yet the same court in its opinion below, while "recognizing" that this Court applies the *uberrimae fidei* doctrine, nevertheless dismissed all of the foregoing as "mere dicta," so that Texas law could be applied, even though the law of Texas on point is the direct opposite of maritime law. The abandonment of the doctrine of *uberrimae fidei* by the Fifth Circuit precludes uniformity in the area of marine insurance and guarantees totally dissimilar and conflicting results in cases arising within the Fifth Circuit itself and among cases arising in other circuits, even though the insurance policies, terms, and conditions are identical. The resulting unpredictability can result only in chaos, unfairness and unequal treatment under the law for both insurers and insureds.

III.

REJECTION OF THE ESTABLISHED PRINCIPLE OF *UBERRIMAE FIDEI* BY EVEN ONE CIRCUIT WILL CREATE A HOSPITABLE CLIMATE FOR FRAUD AND HAVE A MOST DELETERIOUS EFFECT ON BOTH MARINE INSURERS AND THEIR INSUREDS.

The Fifth Circuit's rejection of the *uberrimae fidei* doctrine as entrenched maritime law creates a legal climate in which marine insurance, a necessary element of this nation's maritime commerce, will be converted

from a rational business activity based on the concepts of good faith, rational evaluation of risk, and fair dealing into a floating poker game, with the ultimate loss to be determined by the state in which the casualty may occur. For example, in the present matter the assured misstated vital information concerning the value of her vessel and its operations, information obviously germane to her hull insurance underwriter. Yet when her statements were discovered to be false, the underwriter was still bound to pay off handsomely on the insured's gamble because Texas law, unlike the *uberrimae fidei* doctrine in maritime law, requires the insurer to prove that the insured's misrepresentations of fact were made with a specific intent to deceive the insurer, and Texas insurance law was construed to require that the insured's misrepresentations be causally connected to the destruction of her vessel, whereas maritime law imposes no such burden. *Albany Insurance v. Anh Thi Kieu,* 927 F.2d 882, 891 (5th Cir. 1991).

Aside from the principle of uniformity in the administration of maritime law discussed above, the situation created by the Fifth Circuit's opinion is intolerable because it will create a climate in which the Fifth Circuit will serve as a magnet for vessel owners wishing to procure marine insurance by fraudulent means. The net result is that vessel owners here will be given an inducement to falsify and misrepresent as much as they can in order to induce hull underwriters to insure at lower rates risks which they might otherwise flatly reject. Highlands can think of no reason why this will not occur, because the fraudulent vessel owner has nothing to lose. Caught in his misrepresentation before the placement of insurance, the applicant is in no worse position

than when he started. But if he succeeds and obtains the policy, Texas law and perhaps the law of other jurisdictions in this circuit, will allow him to recover. This train of events should not be allowed to occur. Public policy must continue to discourage dishonesty in marine insurance applications. Sensible commercial ends of maritime commerce are not served by building into the marine insurance law of this country an incentive for insureds to gamble and cheat, which would only lead to higher insurance costs for all vessel owners, including those who act in the utmost good faith.

CONCLUSION

The conflict among the circuits created by the decision below as to the preeminence of *uberrimae fidei* as a controlling principle of maritime law not only would result in disharmony and lack of uniformity in maritime law, but would also permit and facilitate fraud in the marine insurance industry in the United States. Therefore, Highlands Insurance Company, as Amicus Curiae, respectfully urges this Honorable Court to grant the Petition for Writ of Certiorari.

Dated July 29, 1991.

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